Supreme Court, U.S.
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No. 92-1817

In The

Supreme Court of the United States

October Term, 1992

MILES INC.,

Petitioner,

v.

DONALD BRUCE SONDERGARD,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. IS THE ASSERTION OF *IN PERSONAM* JURISDICTION OVER A FOREIGN CORPORATION, BASED SOLELY ON THE CORPORATION'S APPOINTMENT OF A REGISTERED AGENT IN THE FORUM STATE AFTER THE CAUSE OF ACTION AROSE IN ANOTHER STATE, CONSISTENT WITH DUE PROCESS?

Petitioner answers "no."

The district court answered "no."

The Eighth Circuit answered "yes."

Five Circuit Courts have addressed this issue with three (the First, Fourth and Fifth) answering "no" and two (the Third and Eighth) answering "yes."

II. CAN THE ASSERTION OF "GENERAL" JURISDICTION OVER A FOREIGN CORPORATION BE PREDICATED SOLELY ON SALES OF THE CORPORATION'S PRODUCT IN THE FORUM STATE?

Petitioner answers "no."

The district court answered "no."

The Eighth Circuit answered "yes."

At least seven other Circuit Courts have answered this question "no", including the First, Fourth, Fifth, Sixth, Ninth, Tenth and Eleventh Circuits.

LIST OF PARTIES AND CORPORATE AFFILIATES

The parties to the proceedings below were Plaintiff-Appellant Donald Bruce Sondergard, an individual, and Defendant-Appellee Miles Inc., a corporation. They are also parties to the proceedings in this Court, and there are no additional parties.

Miles Inc. is a wholly-owned subsidiary of Bayer AG of Germany. The stock of Bayer AG is publicly held, but is not sold on any stock exchange in the United States. United States citizens can purchase Bayer AG stock on foreign exchanges. Miles Inc. does not have any subsidiaries that are not wholly owned.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner Miles Inc. respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, reversing the district court's dismissal of the suit for lack of personal jurisdiction, is reported at 985 F.2d 1389 and is reprinted as Appendix A at page A1

(references to the appendices bound with this Petition are styled "A ___ ").

The decision and order of the United States District Court for the District of South Dakota (Battey, D.J.) have not been reported. They were dictated from the bench on January 10, 1992. The district court's ruling begins on page 47 of the transcript of proceedings on January 10, 1992 and is reprinted, along with cited pages of the oral argument, as Appendix B at page A21. The district court's order denying the plaintiff's motion for reconsideration is reprinted as Appendix C at page A39.

JURISDICTION

The decision of the Court of Appeals was announced on February 22, 1993. No petition for rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment 14, Section 1, to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. This is a diversity case involving product liability claims against Petitioner Miles Inc. ("Miles"). The following facts are not in dispute. Miles is an Indiana corporation with its principal place of business in Pittsburgh, Pennsylvania. Miles manufactures Alka-Seltzer Plus® Cold Medicine. In October of 1989, while a resident of Utah, Respondent Donald Bruce Sondergard ("Sondergard") ingested Alka-Seltzer Plus in Utah and allegedly suffered injury. At some later time not disclosed in the record, Sondergard moved to South Dakota.

On October 9, 1991, almost two years after the cause of action arose in Utah, Sondergard filed this action in the Pennington County, South Dakota Circuit Court. The summons and complaint were served on CT Corporation, which has a post office box address in Pierre, South Dakota. Miles had appointed CT Corporation as its registered agent for service of process in South Dakota on August 30, 1991, some 22 months after the cause of action arose. Prior to that time, Miles had no registered agent in South Dakota and was not qualified to do business in that State.

2. Miles removed this case to the United States District Court for the Western District of South Dakota on the basis of diversity jurisdiction. On the same day, Miles filed a Motion To Dismiss for lack of personal jurisdiction. Miles argued that the court could exercise neither

"specific" nor "general" jurisdiction over Miles. Specific jurisdiction refers to the exercise of personal jurisdiction where the cause of action arises from or is related to the defendant's activities in the forum state; general jurisdiction refers to the exercise of personal jurisdiction where the cause of action is unrelated to the defendant's forum activities. *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 407, 414 nn. 8-9 (1984). Miles contended, and Sondergard never disputed, that the court lacked specific jurisdiction because the alleged injury bore no relationship to Miles' activities in South Dakota. Miles argued that the court could not exercise general jurisdiction over it for a number of reasons, including that the Due Process Clause forbade such an exercise.[1] Miles maintained that the plaintiff had not proved that Miles had the minimum "systematic and continuous" contacts with the forum state that this Court has declared the necessary constitutional prerequisite for general jurisdiction. *Perkins v. Benguet Mining Co.,* 342 U.S. 437, 438 (1952); *Helicopteros,* 466 U.S. at 418. The mere fact that Miles' registered agent had been served with process did not, Miles argued, obviate the need to determine whether these minimum contacts existed.

Miles moved for a stay of discovery pending resolution of the motion to dismiss, and the district court

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[1] Miles also argued that South Dakota had not adopted general jurisdiction. The district court predicted that the South Dakota Supreme Court would adopt general jurisdiction if presented with the question, and the Eighth Circuit agreed. This issue is not germane to this Petition, and the Court can assume that South Dakota law permits the exercise of general jurisdiction over a foreign corporation.

granted the motion. Firm in the conviction that Miles' appointment of a registered agent furnished a constitutionally sufficient basis for jurisdiction, Sondergard's counsel waived an evidentiary hearing on the nature and extent of Miles' contacts with South Dakota. (Appendix B at A19.) Thus, the only record evidence of activity by Miles in South Dakota was its counsel's agreement with the district court's observation that Alka-Seltzer Plus "probably does appear in every grocery store, drug store, and perhaps some convenience stores in probably every state of the union." (Appendix B at A24.) There was no evidence of how much of the product was sold in South Dakota, over what time period, or how it got into South Dakota.

The district court agreed that the exercise of jurisdiction over Miles based on nothing more than Miles' appointment of a registered agent would violate the due process requirements of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny. (Appendix B at A35.) The court granted Miles' motion and dismissed Sondergard's complaint without prejudice.

3. In response to Sondergard's appeal, Miles again argued that the exercise of jurisdiction based only on its appointment of a registered agent would be unconstitutional. Miles contended that *International Shoe* and *Shaffer v. Heitner*, 433 U.S. 186 (1977), require a careful evaluation of the nature and scope of the defendant's contacts with the forum. Miles further indicated that the record contained no evidence of contacts between it and South Dakota that were systematic and continuous enough to support general jurisdiction.

The Eighth Circuit rejected Miles' argument that the Due Process Clause bars the exercise of jurisdiction over it. Declaring itself "bound by" its decision in *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196 (8th Cir. 1990), the court held that the exercise of general jurisdiction over Miles "did not need to be tested under the due process 'minimum contacts' analysis set forth in *International Shoe*." (Appendix B at A16.) In *Knowlton*, which is reprinted in Appendix D at A41, the Eighth Circuit had reasoned that no "minimum contacts" analysis was necessary where jurisdiction was based on service upon a foreign corporation's registered agent. 900 F.2d at 1200.

The court below went on to hold in the alternative that the exercise of general jurisdiction over Miles would be constitutional "[e]ven without the appointment of the process agent." (Appendix B at A17.) Astonishingly, the court reasoned that a manufacturer whose only contact with a state is the sale of its products therein should reasonably foresee that it might be hauled into that state's courts to defend against causes of action having no relationship to the manufacturer's in-state activities. Based on this extraordinary conception of foreseeability, the court concluded that South Dakota's exercise of general jurisdiction over Miles would not violate " 'traditional notions of fair play and substantial justice.' " (Appendix A at A14-A15, quoting *International Shoe*.)

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Ruling That *Personal Jurisdiction* May Constitutionally Be Based Solely On The Appointment Of A Registered Agent Is In Direct Conflict With The Decisions Of Other Circuits And This Court.

A. There is a direct conflict among the five circuits that have decided this issue.

Five Circuit Courts have addressed the question whether the appointment of a registered agent is sufficient to establish personal jurisdiction consistent with due process in cases where the cause of action is unrelated to the defendant's activities in the forum state. Three circuits (the First, Fourth and Fifth) have decided that it is not sufficient; two circuits (the Third and the Eighth) have held that it is sufficient. There is also a conflict among the district court decisions on this issue.

The issue was first addressed by the Fourth Circuit in *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745 (4th Cir.), *cert. denied*, 404 U.S. 948 (1971). The Fourth Circuit held that the South Carolina courts did not have jurisdiction over Sterling Drug Company, a large pharmaceutical manufacturer incorporated in Delaware, in a case arising from the ingestion of one of Sterling's drugs outside South Carolina. Sterling was qualified to do business in South Carolina, had appointed a registered agent there, and maintained five "detail men" in the state to promote its products with doctors and drugstores throughout the state. 444 F.2d at 746. In its due process analysis, the court stated:

> We think the application to do business and the appointment of an agent for service to fulfill a state law requirement is of no special weight in the present context. Applying for the privilege of doing business is one thing, but the actual exercise of that privilege is quite another. See International Shoe Co. v. Washington, supra, 326 U.S. at 319, 66 S.Ct. 154. The principles of due process require a firmer foundation than mere compliance with state domestication statutes.

444 F.2d at 748. *Ratliff* is now more than 20 years old, but it has repeatedly been confirmed and followed by courts within and outside the Fourth Circuit. *See, e.g., Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 182 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1047 (1993)[2] (following *Ratliff*); *Nichols v. G.D. Searle & Co.*, 783 F. Supp. 233, 239 (D. Md. 1992), *aff'd*, ___ F.2d ___, 1993 U.S. App. LEXIS 9106 (4th Cir. 1993) ("[t]he holding in *Ratliff* is the law today").

The First and Fifth Circuits agree with the Fourth that appointment of a registered agent does not by itself establish a constitutionally sufficient basis for general jurisdiction. *Sandstrom v. Chemlawn Corp.*, 904 F.2d 83, 89 (1st Cir. 1990); *Siemer*, 966 F.2d at 182-83. In both cases, the Circuit Courts held that it would violate due process to exercise general jurisdiction over corporations solely because they had qualified to do business and appointed

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[2] In their Petition For Certiorari in *Siemer*, the Petitioners did not argue that there is a split among the Circuit Courts on the effect of the appointment of a registered agent. They argued only that the Fifth Circuit's decision was inconsistent with *Burnham v. Superior Court*, 495 U.S. 604 (1990). *Burnham* is discussed in Part IB of this Petition at pages 14-15, *infra*.

registered agents in the forum states. As the Fifth Circuit succinctly explained in *Siemer*:

> To assert, as plaintiffs do, that mere service of process on a corporate agent automatically confers *general jurisdiction* displays a fundamental misconception of corporate jurisdictional principles. This concept is directly contrary to the historical rationale of *International Shoe* and subsequent Supreme Court decisions.

966 F.2d at 183.

The Third Circuit has joined the Eighth in holding that no due process analysis is necessary where jurisdiction is based on the appointment of a resident agent. *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991).[3] The decisions of the Third and Eighth Circuits conflict with those of the First, Fourth and Fifth Circuits outlined above.

A number of district courts have also addressed this issue and there is disagreement among them as well. It is notable that in all three of the Eighth and Third Circuit cases where appointment of a registered agent was held

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[3] Curiously, the court in *Bane* made no reference to its earlier decision in *Nehemiah v. Athletics Congress of the U.S.A.*, 765 F.2d 42 (3d Cir. 1985), where it held that in-state service on an unincorporated association's president was insufficient to confer jurisdiction consistent with due process. The court in *Nehemiah* relied heavily on the analogous situation of jurisdiction over corporations and found, after surveying the authorities, that "it is undisputed that mere service on a corporate agent cannot establish personal jurisdiction without a minimum contacts inquiry." 765 F.2d at 47.

to be a constitutionally sufficient basis for general jurisdiction (*Knowlton, Bane* and the present case), the district courts had held that registration was *not* sufficient. *Compare also Jones v. Family Inns of America, Inc.*, 1989 U.S. Dist. LEXIS 5868 (E.D. La. 1989) (appointment of registered agent not sufficient); *In re Mid-Atlantic Toyota Antitrust Litigation*, 525 F. Supp. 1265, 1278 (D. Md. 1981), *modified on other grounds*, 541 F. Supp. 62 (D. Md. 1981), *aff'd*, 704 F.2d 125 (4th Cir. 1983) (appointment of registered agent not sufficient); and *Schreiber v. Allis-Chalmers Corp.*, 448 F. Supp. 1079, 1088-91 (D. Kan. 1978) (appointment of registered agent not sufficient), *rev'd on other grounds*, 611 F.2d 790 (10th Cir. 1979);[4] *with Deines v. Vermeer Mfg. Co.*, 752 F. Supp. 989, 1000 (D. Kan. 1990) (registration alone is sufficient). *Cf. Chicago Bridge & Iron Co. v. Islamic Republic of Iran*, 506 F.2d 981, 985 (N.D. Ill. 1980) (waiver of sovereign immunity in treaty does not constitute waiver of due process objection to personal jurisdiction and does not "obviate the need for establishing minimum contacts with a forum").

The cases that find appointment of a registered agent to be sufficient hold that the appointment of the agent

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[4] The district court in *Schreiber* held squarely that the appointment of a registered agent was not sufficient and that a minimum contacts analysis must be performed. On appeal, the Tenth Circuit found that jurisdiction existed based on the fact that the defendant had done business in the forum state for over 50 years and had a manufacturing plant in the state. 611 F.2d at 793. The appellate court did not view registration as dispositive, and performed the type of minimum contacts analysis that the Eighth Circuit believes is unnecessary. The Tenth Circuit, therefore, could arguably be added to the list of circuits that hold registration insufficient.

constitutes "consent" to jurisdiction, i.e., a waiver of due process rights. The cases that find the appointment of a registered agent to be *in*sufficient hold, expressly or by implication, either that the appointment does *not* constitute a consent/waiver,[5] or that this type of "consent" is not constitutionally sufficient without minimum contacts.[6] Regardless of the terminology used, the fundamental question is the same: what is the constitutional significance of the appointment of a registered agent? This question has arisen repeatedly in the lower courts, with irreconcilably conflicting answers, and will undoubtedly continue to arise repeatedly.

The split among the circuit and district courts on the constitutional significance of the appointment of a registered agent has resulted in a lack of uniformity in the

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[5] In *Siemer*, for example, the Fifth Circuit held that registering an agent "does not act as consent to be hauled into Texas courts on any dispute with any party anywhere concerning any matter," and is "not . . . a waiver of [defendant's] right to due process protection." 966 F.2d at 183. *See also* the district court opinion in *Sandstrom*, 727 F. Supp. at 679 (appointment of registered agent does not constitute "submission" to jurisdiction).

[6] For example, in *Mid-Atlantic Toyota*, 525 F. Supp. at 1278, the Maryland district court reasoned that "[c]onsent by itself is meaningless." Consent by registration is only a "manifestation" of activities that may indicate sufficient contacts with the forum state, but it is the contacts themselves that confer jurisdiction, not the symbolic act of registration. *Id.* The Kansas district court in *Schreiber*, 448 F. Supp. at 1090, stated that "such 'consent' statutes as those relied upon by plaintiff must be interpreted to incorporate a 'minimum contacts' test." The court held that where minimum contacts are absent, a statute requiring the appointment of a registered agent cannot establish jurisdiction by consent.

nation's courts. Resolving conflicts among the circuit courts is a "principal purpose" for exercising the Court's certiorari jurisdiction. *Braxton v. United States,* ___ U.S. ___, 111 S.Ct. 1854, 1857 (1991). *See* Supreme Court Rule 10.1(a). Conflict among the district courts is another important consideration. *See Heffron v. International Soc'y for Krishna Consciousness,* 452 U.S. 640, 646 n.9 (1981); *Curtis v. Loether,* 415 U.S. 189, 191 n.2 (1974). The question presented here is far from settled, and the guidance of this Court is needed.

B. The Eighth Circuit's decision conflicts with decisions of this Court.

The Eighth Circuit's ruling that jurisdiction did not need to be tested under the minimum contacts analysis of *International Shoe* (A16), is in direct conflict with the decisions of this Court. In *International Shoe,* the Court rejected the application of "mechanical or quantitative" criteria, and held that due process depends "upon the quality and nature of the activity" of the defendant in the forum state. 326 U.S. at 319. In establishing the "minimum contacts" requirement, the Court set aside the fictions of "consent" and "presence" that had been used to test corporate jurisdiction after *Pennoyer v. Neff,* 95 U.S. 714, 735-36 (1878).[7] 326 U.S. at 316-18.

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[7] Traditionally, jurisdiction over a corporation was available only in the state of its incorporation. *Bank of Augusta v. Earle,* 13 Pet. (38 U.S.) 519, 588 (1839). *Pennoyer* involved an individual, but the Court suggested in *dicta* that a state could constitutionally deem a corporation doing business in the state to have "consented" to jurisdiction. 95 U.S. at 735-36. Although

International Shoe signalled a "dramatic change" in jurisdiction analysis. *Shaffer v. Heitner,* 433 U.S. 186, 205 (1977). In *Shaffer,* the Court held that "*all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny," 433 U.S. at 212 (emphasis added), and overruled its prior decisions that were inconsistent with the *International Shoe* standard, *Id.* at n. 39. As the Court explained, defendants have a "*right* to be brought to judgment only in States with which they [have] had 'minimum contacts.' " 433 U.S. at 216 (emphasis added).[8]

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17 years later the Court was still applying the traditional *Bank of Augusta* view, *see In re Keasbey & Mattison Co.,* 160 U.S. 221, 229 (1895) (appointment of resident agent does not waive right to be sued only where incorporated), the Court eventually adopted the consent rationale suggested by *Pennoyer. See Neirbo Co. v. Bethlehem Shipbuilding Corp.,* 308 U.S. 165, 170-71 (1939); *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.,* 243 U.S. 93, 96 (1917). That rationale prevailed until *International Shoe.*

[8] Under the Delaware statutory scheme struck down in *Shaffer,* the ownership of Delaware property automatically subjected its owner to general jurisdiction in Delaware. Because of the similarity of such a scheme to the statutory imposition of "consent" to jurisdiction, *Shaffer* "places in doubt the constitutionality of all 'consent to jurisdiction' provisions." *Chicago Bridge & Iron Co. v. Islamic Republic of Iran,* 506 F. Supp. 981, 986 (N.D. Ill. 1980) (no personal jurisdiction over Republic of Iran, even though it "consented" to jurisdiction when it waived sovereign immunity in treaty with United States). *See also* L. Brilmayer, *A General Look at General Jurisdiction,* 66 Tex. L. Rev. 721, 757-60 (1988) ("formidable constitutional issues surrounding general jurisdiction by consent arise when consent derives from a statutorily required appointment;" "[s]tatutes . . . which in effect require consent to jurisdiction, circumvent all due process notions of fairness underlying minimum contacts analysis" and are "doubtful"); R. Casad, *Jurisdiction in Civil Actions,* ¶ 3.02[2][a][ii] (1983).

The Court has reaffirmed several times since *Shaffer* that all assertions of state-court jurisdiction must be evaluated under the minimum contacts standard. *Rush v. Savchuk*, 444 U.S. 320, 327 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("[a]s has long been settled, and as we reaffirm today, a state court may exercise personal jurisdiction over a nonresident only so long as there exist 'minimum contacts' between the defendant and the forum State"); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n. 10 (1982) ("our holding today does not alter the requirement that there be 'minimum contacts' between the nonresident defendant and the forum state").

The proposition that general jurisdiction may only be exercised over nonresident corporations that have sufficient minimum contacts with the forum state is not undercut by *Burnham v. Superior Court*, 495 U.S. 604 (1990). In that case, the Court concluded that due process permits a state to exercise personal jurisdiction over a nonresident individual who is personally served while present in the state. No opinion for the Court was produced in *Burnham*, though, because the members of the Court divided over whether this type of jurisdictional exercise requires a "minimum contacts" analysis.

The most extensive opinions in *Burnham* were written by Justices Brennan and Scalia, each one joined in whole or in part by three other Justices. Justice Brennan applied the minimum contacts test, the same test that the Eighth Circuit refused to apply below. Justice Scalia found it unnecessary to inquire into the scope and nature of the defendant's contacts with the forum because personal

presence jurisdiction over individuals was well-established and regarded as fair in this country prior to the adoption of the Fourteenth Amendment in 1868. 495 U.S. at 619. Significantly, Justice Scalia distinguished his analysis of jurisdiction over individuals from the systematic and continuous activity standard that the Court has applied to general jurisdiction over corporations – entities that "have never fitted comfortably in a jurisdictional regime based primarily upon 'de facto power over the defendant's person.' " *Id.* at 610, n. 1 (quoting *International Shoe*). Furthermore, Justice Scalia acknowledged that "consent" to jurisdiction in the form of appointment of a resident agent for service of process was "purely fictional," and "[o]ur opinion in *International Shoe* cast those fictions aside." *Id.* at 617-18.[9]

The Eighth Circuit's holding that no minimum contacts analysis is necessary where general jurisdiction over a foreign corporation is based on the appointment of a registered agent is inconsistent with this Court's decisions and should be reversed.

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[9] The present case does not require a resumption of the *Burnham* debate about whether continuing traditions are subject to minimum contact scrutiny. Jurisdiction based solely on the appointment of a registered agent in causes of action unrelated to forum activities is neither a "traditional" principle (because traditionally, corporations could only be sued in the state of incorporation, *see* note 7, *supra*), nor a "continuing" one (because a large and growing number of modern day courts have rejected it, *see* § IA, *supra*). At the very least, the split in *Burnham* left unresolved questions that could be addressed in the present case.

II. The Eighth Circuit's Alternative Ruling That Mere Sales Of A Corporation's Products In The Forum State Are Constitutionally Sufficient To Confer Jurisdiction Conflicts With The Decisions Of Other Circuits And This Court.

A. The Eighth Circuit's opinion directly conflicts with the decisions of at least seven circuit courts.

The Eighth Circuit's alternative holding relating to sales of Miles products in South Dakota also created a circuit split. The court held that the mere fact that a corporation's products are sold in the forum state creates constitutionally sufficient contacts with the forum to confer general jurisdiction. At least seven circuit courts have flatly rejected that proposition.

In both *Siemer* and *Ratliff,* discussed in § IA above, the Circuit Courts held that the fact that a defendant manufacturer's products were offered for sale in the forum state was not sufficient to confer jurisdiction consistently with the Due Process Clause. In *Siemer,* defendant Learjet sold one percent of its products in the forum state, advertised nationally, and mailed information to potential customers in the state. 966 F.2d at 181. *Ratliff* involved a pharmaceutical manufacturer that promoted its products to doctors and drugstores "throughout the state." 444 F.2d at 746. The Eighth Circuit's opinion is in direct conflict with these decisions.[10]

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[10] The Eighth Circuit never discussed the combined effect of Miles' appointment of a registered agent and the sale of its product in South Dakota. Even if the court had ruled that the

The Eighth Circuit's opinion is also inconsistent with *Glater v. Eli Lilly & Co.*, 744 F.2d 213 (1st Cir. 1984). In *Glater*, defendant Eli Lilly, another pharmaceutical manufacturer, employed sales representatives in the forum state, marketed its products nationwide, and advertised its products in journals circulated in the forum state. Its products were sold in the forum state through independent wholesalers, some of which were located in the forum state. 744 F.2d at 214-15. The First Circuit, following this Court's decision in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), held that these activities were insufficient to establish general jurisdiction. 744 F.2d at 217. *See also Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 372, 375-76 (5th Cir. 1987) (no general jurisdiction despite defendant's $250,000,000 in sales in forum state over five year period); *Conti v. Pneumatic Products Corp.*, 977 F.2d 978, 981 (6th Cir. 1992) (no general jurisdiction despite $900,000 annual sales in forum state plus periodic visits); *Madara v. Hall*, 916 F.2d 1510, 1516 n. 7 (11th Cir. 1990) (no general jurisdiction over recording artist despite sales of records and periodic performances in forum state); *Fidelity & Cas. Co. v. Philadelphia Resins Corp.*, 766 F.2d 440, 44647 (10th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986) (sales of defendant's products in forum state, combined with advertising in national magazines, were insufficient to establish general jurisdiction); *Congoleum Corp. v. DLW Aktiengellschaft*, 729 F.2d 1240, 1243 (9th Cir. 1984) (no

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combination of those two contacts was sufficient to confer general jurisdiction, that decision would still be in conflict with *Siemer* and *Ratliff*. Both types of contacts, and more, were present in those cases, yet the Circuit Courts held that they were insufficient.

general jurisdiction despite sales and marketing efforts in forum state through resident agents).

Apart from the Eighth Circuit's opinion in this case, no Circuit Court has held that mere sales of the defendant's products in the forum state are sufficient to support a constitutional exercise of general jurisdiction. The Eighth Circuit's opinion has created a conflict among the circuits, and this Court should resolve the conflict. *See* Supreme Court Rule 10.1(c).

B. The Eighth Circuit's opinion conflicts with decisions of this Court.

The minimum contacts necessary to support general jurisdiction are greater than those that will support specific jurisdiction. Thus, general jurisdiction requires a finding of "continuous and systematic" activities by the defendant in the forum state. *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 438 (1952); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418 (1984). A number of this Court's decisions provide guidance as to which contacts are continuous and systematic enough to support general jurisdiction and which are not. Those decisions demonstrate that the "continuous and systematic" standard is a strenuous one and that the sale of a corporation's product in the forum state is not, standing alone, a constitutionally sufficient basis for general jurisdiction.

Since *International Shoe*, this Court has upheld an assertion of general jurisdiction over a nonresident corporate defendant only once, in *Perkins*. The forum activities of the defendant in that case were as substantial as one could imagine: the defendant had made the forum

state, Ohio, its "principal, if temporary, place of business." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 n. 11 (1984) (discussing *Perkins*). It had transferred its headquarters, president and general manager, and business records to Ohio and made all significant corporate decisions there. *Perkins*, 342 U.S. at 447-48.

In decisions subsequent to *Perkins*, this Court has held that activities less substantial than the *Perkins*-type of "continuous and systematic" conduct within the forum state will not support the exercise of general jurisdiction. *Helicopteros* 466 U.S. at 415 (characterizing the *Perkins* contacts). Of particular significance here, the Court has indicated that neither in-forum purchases by the corporation nor sales of its product will, by themselves, meet the systematic and continuous contact standard. In *Helicopteros*, the Court held that a corporation's regular purchases of products from vendors in the forum state, along with visits and other contacts connected with those purchases, were insufficient to support general jurisdiction. *See also Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923) (regular purchases from suppliers in forum state insufficient to confer jurisdiction where cause of action is unrelated to those purchases). In *Keeton*, the Court noted in a telling dictum that the regular sale of 10,000 to 15,000 copies of defendant Hustler Magazine's periodical in the forum state each month was a less significant contact with the forum than the *Perkins* contacts and stated that Hustler's activities "may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities." 465 U.S. at 779.

Based solely on Miles' counsel's agreement with the district judge's statement during oral argument that

Alka-Seltzer Plus "probably does appear" on the shelves of grocery and drug stores in every state, the Eighth Circuit concluded that Miles had constitutionally sufficient contacts with South Dakota to support the exercise of general jurisdiction over it. This conclusion is entirely inconsistent with this Court's insistence that contacts be "the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*." *Helicopteros*, 466 U.S. at 416. The Court should grant certiorari because of the conflict with the Court's decisions. *See* Supreme Court Rule 10.1(c).

III. The Court Should Resolve Important Questions Under The Due Process Clause Of The Fourteenth Amendment.

This case raises questions of constitutional due process rights. The Court has often found personal jurisdiction questions to be "important constitutional question[s]." *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). Thus, under Supreme Court Rule 10.1(c), this case involves "important question[s] of federal law which ha[ve] not been, but should be, settled by this Court," and certiorari should be granted. Because of the conflicts in the lower court decisions, the Court should grant certiorari "[b]ecause of the threat to the goal of uniformity of federal procedure posed by the decision below." *Hanna v. Plumer*, 380 U.S. 460, 463 (1965).

CONCLUSION

For all of these reasons, the petition for certiorari should be granted.

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May 13, 1993

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APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-1274

Donald Bruce Sondergard, Appellant, v. Miles, Inc., Appellee.	* Appeal from the * United States * District Court for * the * District of South * Dakota * *

Submitted: November 11, 1992

Filed: February 22, 1993

Before JOHN R. GIBSON and MAGILL, Circuit Judges, and VAN SICKLE,* Senior District Judge.

MAGILL, Circuit Judge.

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* THE HONORABLE BRUCE M. VAN SICKLE, Senior United States District Judge for the District of North Dakota, sitting by designation.

Our task in this diversity of citizenship case is to consider the novel question whether the South Dakota courts would exercise personal jurisdiction over a foreign corporation based upon service of process on that corporation's registered agent, even though the cause of action arose outside the state before the corporation appointed the agent. South Dakota courts have not considered this precise question, and we can find no others that have. We believe, however, that South Dakota would accept jurisdiction over such a case, and that such jurisdiction would comply with the dictates of the due process clause. Therefore, we reverse.

I. FACTS

This products liability action comes to us on admitted facts. Appellant Donald Sondergard alleges that on October 27, 1989, he consumed Alka-Seltzer Plus cold medicine, which is manufactured by the appellee, Miles, Incorporated. Sondergard claims that the Alka-Seltzer Plus reacted chemically with the prescription drug Nardil, causing a hypertensive crisis resulting in a stroke. At the time he consumed the Alka-Seltzer Plus, Sondergard was a resident of Utah.

Miles, Incorporated, is an Indiana chartered corporation with its principal place of business in Pittsburgh, Pennsylvania. Miles produces Alka-Seltzer Plus at its Elkhart, Indiana, division. At the time Sondergard consumed Alka-Seltzer Plus, Miles sold the product in all fifty states. Miles had not at that time either registered to transact business as a foreign corporation in South

Dakota or appointed an agent for service of process in South Dakota.

Two subsequent events give rise to the issue presented in this case. First, Sondergard moved from Utah to South Dakota. Second, Miles applied to the South Dakota Secretary of State for a Certificate of Authority to "do or engage in" business as a foreign corporation in South Dakota, and was granted such authority on August 30, 1991. On or about the same date, Miles appointed CT Corporation System as its registered agent for service of process in South Dakota.

Sondergard commenced the instant lawsuit in the Seventh Judicial Circuit Court, Pennington County, South Dakota, on October 9, 1991, by serving process upon CT. On November 6, 1991, Miles removed the case to the United States District Court for the District of South Dakota, Western Division, and on the same day moved to dismiss for lack of personal jurisdiction. The district court heard oral argument and granted the motion to dismiss on January 10, 1992. On January 15, 1992, Sondergard filed a motion requesting the court to reconsider its decision or in the alternative to stay its order pending limited discovery. The court denied this motion on January 24, 1992, and entered an order dismissing the case without prejudice. This appeal followed.

II. DISCUSSION

A. South Dakota Jurisdiction

South Dakota requires that foreign corporations seeking to "do or engage in any business"[1] in South Dakota

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[1] South Dakota requires that a foreign corporation engage in significant *intrastate* activities before such certificate is required. A non-exhaustive list of activities not requiring such a certificate include:

(1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes;
(2) Holding meetings of its directors or shareholders or carrying on other activities concerning its internal affairs;
(3) Maintaining bank accounts;
(4) Maintaining offices or agencies for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositories with relation to its securities;
(5) Effecting sales through independent contractors;
(6) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this state before becoming binding contracts;
(7) Creating evidences of debt, mortgages or liens on real or personal property;
(8) Securing or collecting debts or enforcing any rights in property securing the same;
(9) Transacting any business in interstate commerce;
(10) Conducting an isolated transaction completed within a period of thirty days and not in the course of a number of repeated transactions of like nature.

S.D. Codified Law § 47-8-1.1 (1991).

register as a foreign corporation with the secretary of state, and, *inter alia,* appoint a registered agent to accept process. S.D. Codified Laws §§ 47-8-1, 47-8-1.1, 47-8-11 (1991). The question we must consider is whether such appointment renders the corporation amenable to the personal jurisdiction of South Dakota's courts on any cause of action.

The analysis of personal jurisdiction questions involves two steps. We first must consider whether the state in question would accept jurisdiction under the circumstances. Then we must determine whether that exercise of jurisdiction comports with due process restrictions. *Dakota Indus. v. Dakota Sportswear,* 946 F.2d 1384, 1387-88 (8th Cir. 1991). We examine these questions in turn.

The Supreme Court has held that states exercise two broad types of personal jurisdiction: specific jurisdiction and general jurisdiction. *Helicopteros Nacionales de Colombia v. Hall,* 466 U.S. 408, 414-16 (1984). Specific jurisdiction refers to jurisdiction over causes of action arising from or related to a defendant's actions within the forum state. *Id.* at 414. General jurisdiction, on the other hand, refers to the power of a state to adjudicate any cause of action involving a particular defendant, regardless of where the cause of action arose. *Id.* at 415.

Miles argues correctly that South Dakota would not exercise specific jurisdiction in this case, as none of the actions complained of occurred within or had any connection to South Dakota. Thus, we must examine whether

South Dakota has authorized the exercise of general jurisdiction over non-resident corporations, and whether it would apply the doctrine in this case.

The South Dakota Supreme Court has not held that the doctrine of general jurisdiction extends to all non-resident corporations. It has, however, discussed the issue in a more limited setting on two occasions. In *Thomson v. Meridian Life Ins. Co.*, 162 N.W. 373 (S.D. 1917), the South Dakota Supreme Court held that personal service upon the South Dakota insurance commissioner established valid personal jurisdiction over an insurance company registered to do business in the state even though the policy was issued and the death occurred outside the state. When considering the question of jurisdiction over the out-of-state insurance corporation, the court stated: "But it seems to be the general policy of our law *to place individuals and foreign corporations coming into this state upon the same basis, so far as the right to sue them is concerned,* and it is our duty to give effect to that intent until the federal courts shall affirm or deny the constitutionality of such legislation." *Id.* at 376 (emphasis added). The court also concluded that

> [t]he weight of modern authority . . . seems to support the proposition that a modern corporation may be sued on a transitory cause of action in any jurisdiction where it can be found in the sense that service may be perfected upon an agent or officer transacting business for the corporation within that jurisdiction, and that in the absence of statutory provisions to the contrary, the residence of the plaintiff and the place at which the cause of action arose are not material

> questions to be determined to maintain jurisdiction if the corporation can be found and served.

Id. The question whether such service in fact did confer jurisdiction, as opposed to whether it merely could, was a question of legislative intent, the court said. It found such an intent in the insurance statute, noting that the statute provided for service on the commissioner "with the same effect as if the company existed in this state." *Id.* at 375.

The South Dakota Supreme Court considered the same issue in 1985. *Sharkey v. Washington Nat'l Ins. Co.*, 373 N.W.2d 421 (S.D. 1985). The court reaffirmed the *Thomson* view, noting that in *Thomson*, "[t]he court adopted the view that a corporation may be sued on a transitory cause of action in any jurisdiction in which it may be served with process, and that the residence of the plaintiff and the place at which the cause of action arose are immaterial to the question of jurisdiction." *Id.* at 425. The court's language concerning general jurisdiction is not limited solely to insurance companies, but includes all corporations.

Miles initially contends that these cases are inapposite, as they apply only to insurance companies. We disagree. Miles confuses the question of whether the South Dakota courts would accept the doctrine of general jurisdiction with the question of whether service of process on the company's registered agent confers such general personal jurisdiction. *Thomson* and *Sharkey* are irrelevant to the latter question because the courts there considered a statutory scheme limited to insurance companies. The two cases are relevant, however, to the question whether South Dakota would adopt the doctrine of

general jurisdiction for all corporations. The *Thomson* and *Sharkey* courts did adopt the doctrine of general jurisdiction, as they allowed the insurance companies to be sued on causes of action arising outside the state. Moreover, the language in these cases clearly extends beyond insurance corporations to include all corporations, and suggests that if the corporation could properly be served, the court would uphold jurisdiction over any cause of action. Given South Dakota's consistent trend of broadly construing its personal jurisdiction,[2] we believe that the South Dakota Supreme Court would hold that the doctrine of general jurisdiction accepted for insurance companies in *Thompson* and *Sharkey* applies to all foreign corporations.

We now must consider whether the South Dakota legislature intended a foreign corporation's appointment of an agent for service of process to constitute submission to the general jurisdiction of the South Dakota courts. As *Thomson* and *Sharkey* put it, the question is whether the corporation "can be served" with process when the cause of action arose outside the state. We believe that the South Dakota legislature intended the authority of a foreign corporation's registered agent to accept process to

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[2] South Dakota has evidenced a clear policy to extend its jurisdiction to the extent allowed under the due process clause. *See State v. American Bankers Ins. Co.*, 374 N.W.2d 609, 612 (S.D. 1985); *Russel v. Balcom*, 328 N.W.2d 476, 479 (S.D. 1983); John W. Larson, In *Personam Jurisdiction and the South Dakota Jurisdictional Statutes: A Basic Review and Update*, 31 S.D. L. Rev. 116 (1985) (South Dakota Supreme Court has consistently expanded its personal jurisdiction).

extend to causes of action arising outside the state prior to the appointment of the agent.

We start with the backdrop provided by this court's decision in *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196 (8th Cir. 1990). There, in considering the effect of a Minnesota statute requiring foreign corporations to appoint an agent for service of process,[3] the court stated that as a general rule, "[t]he whole purpose of requiring designation of an agent for service is to make a nonresident suable in the local courts. The effect of such a designation can be limited to claims arising out of in-state activities, and some statutes are so limited, but the Minnesota law contains no such limitation." *Id.* at 1199. Thus, this court has presumed that service upon a company's registered agent is sufficient to confer jurisdiction.

We believe that South Dakota intended service upon a foreign corporation's registered agent to be effective in these circumstances. South Dakota law provides that for foreign corporations:

> If the action be against a foreign private corporation, [delivery of process shall constitute personal service] on the president or other head of the corporation, secretary, cashier, treasurer, a director or managing agent thereof; but such service can be made as to a foreign corporation only when it has property in this state or the cause of action arose therein, *or when such service shall be made within this state personally upon the*

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[3] The statute in question provided: "A foreign corporation shall be subject to service of process . . . by service upon its registered agent." Minn. Stat. § 303.13 subd. 1(1).

> *president, treasurer, secretary, or authorized agent for the service of process.*

S.D. Codified Laws § 15-6-4(d)(2) (1991) (emphasis added).

We believe that this provision demonstrates two things. First, a foreign corporation's authorized agent can be served even if the cause of action arose outside the state. The statute provides that a personal service is effective as to a foreign corporation if, *inter alia*, service is made personally upon the corporation's authorized agent. It further suggests that such service is effective even if the cause of action arose outside the state. The three situations in which a foreign corporation can be served are stated in the disjunctive, which makes sense only if they each operate as independent bases to support valid service.

Second, service on a foreign corporation's properly authorized agent is sufficient to establish personal jurisdiction. Miles contends that this section refers only to manner of service, rather than amenability to it. Were the quoted sentence to end at the semicolon, we might agree. The first part of the sentence does in fact seem to deal with the "manner" of service. The limitation in the second clause concerning situations in which personal service "can be made," however, seems more logically to refer to limitations upon amenability to service, i.e., when service has its effect to confer jurisdiction.

The South Dakota Supreme Court confirms that it considers the latter portion of this section to be jurisdictional. In *Thomson*, the court used the identical provisions then in force to demonstrate its conclusion that "it seems

to be the general policy of our law to place individuals and foreign corporations coming into this state upon the same basis, so far as the right to sue them is concerned." *Thomson*, 162 N.W. at 376. The context of the opinion clearly demonstrates that the South Dakota Supreme Court believed individuals would be subject to suit on any cause of action if personally served with process within the state. Equation of the requirements for service of process on a foreign corporation with the policy noted above thus makes sense only if such service conferred personal jurisdiction.[4] *Id.* at 376. To our knowledge, the South Dakota legislature has neither changed the language of the statute nor repudiated the *Thomson* holding.

We must then consider whether the process agent appointed by Miles has authority to receive process relating to causes of action accruing outside the state. The

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[4] The *Thomson* court first noted that § 885 of the South Dakota Civil Code provided that "service of process may be made upon the duly authorized agent in any action in which said corporation may be a party." It then noted, in relation to service of summons, that the statute provided, "[b]ut such service can be made in respect to a foreign corporation only when it has property in this state, or the cause of action arose therein, or when such service shall be made within this state personally upon the . . . duly authorized agent thereof," and that "[s]ervice made in any of the modes provided in this section shall be taken and held to be personal service." That the court believed that service in this manner conferred valid personal jurisdiction is confirmed both by its use as an example for the general proposition noted above, and by the court's further statement, immediately following, that "[w]e are *also* inclined to the view that the Legislature intended [the insurance appointment of service agent statute] to cover transitory actions accruing in another jurisdiction. . . . " *Id.* at 376.

statute concerning this agent provides: "The registered agent appointed pursuant to § 47-8-11 by a foreign corporation authorized to do or engage in any business in this state shall be an agent of such corporation *upon whom any process, notice or demand required or permitted by law to be served upon the corporation may be served.*" S.D. Codified Laws § 47-8-15 (1991) (emphasis added). Like the statute construed in *Knowlton*, this statute does not limit the authority of the agent to accept service to causes of action arising within the state.

South Dakota has limited the authority of process agents in other contexts, however. Prior to 1965, when the present provision concerning registered agents was adopted, South Dakota required a foreign corporation to " 'constitute[ ] and appoint[ ] the Secretary of State its true and lawful agent upon whom the summons, notices, pleadings, or process in any action or proceeding against it may be served in respect to any liability arising out of any business, contract, or transaction in the state. . . . ' " *Uhlich v. Hilton Mobile Homes*, 126 N.W.2d 813, 815 (S.D. 1964) (quoting S.D. Codified Laws § 11.2003 (repealed 1965)). Thus, the prior provision specifically restricted the scope of the Secretary's agency to causes of action arising from the corporation's transactions within the state, even while the corporation was registered to transact business. Similarly, the present provision for withdrawal of authorization to do business as a foreign corporation provides that in order to secure a certificate of withdrawal, the corporation must, *inter alia*:

> revoke[ ] the authority of its registered agent in this state to accept service of process and *consent [ ]* that service of process in any action, suit or

> proceeding based upon any cause of action *arising in this state during the time the corporation was authorized to do or engage in any business in this state* may thereafter be made on such corporation by service thereof on the secretary of state.

S.D. Codified Laws § 47-8-23(4) (1991) (emphasis added). We believe our conclusion in *Knowlton* applies with equal force here: "These words of limitation . . . clearly indicate that the Legislature knew how to limit the purposes of service of process when it wanted to do so, and that provisions for service of process without such an express limitation are intended to apply to any claims made against a corporation with a registered agent within the state." *Knowlton*, 900 F.2d at 1199.

Miles contends, however, that the limitation on the agent's authority presently exists within the provision that the agent may accept "any process, notice or demand required or permitted by law." Miles argues the phrase "required or permitted by law" means that the agent may validly be served with only such process for which there is an independent basis for personal jurisdiction, such as the long-arm statute. Sondergard argues, and we agree, that this language more naturally refers to the types of process "required or permitted" to be served in South Dakota. Because corporations may be served with process in a tort case, such as this one, such process is "permitted" by law. We cannot improve upon the words of Justice Stewart,[5] addressing the identical objection to an identically worded New Hampshire statute:

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[5] Justice Stewart was sitting by designation in the First Circuit.

> In our view there is a more natural reading of the phrase 'process, notice or demand . . . permitted by law' than that suggested by [the defendant]. We believe that the phrase merely refers to lawful process, notice or demand. Thus, because a summons and complaint in a tort action are documents that may be served on a corporation in accordance with the law, the service in this case falls within the term of the statute. Had the New Hampshire legislature wished to restrict the applicability of the provision to situations in which another statute created jurisdiction, it would hardly have expressed itself in so cryptic a fashion. There are many phrases that would communicate such a restriction far more clearly than the phrase 'process . . . permitted by law.' We would be hesitant to attribute to the legislature so obscure a means of expressing itself as [the defendant] attributes to it, when a far more natural reading of the words is possible.

Holloway v. Wright & Morrissey, Inc., 739 F.2d 695, 697 (1st Cir. 1984).[6] Because Miles' agent was authorized under state law to accept process as to causes of action arising

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[6] In *Holloway*, the plaintiff asserted jurisdiction based upon personal service of the defendant's registered agent. This agent was appointed pursuant to New Hampshire Revised Statutes § 293-A:119, which provided that "[t]he registered agent appointed by a foreign corporation authorized to do business in this state shall be an agent of the corporation upon whom any process, notice or demand required or permitted by law to be served on the corporation may be served." The defendant claimed that service of process would be "required or permitted by law" only if the corporation could be served pursuant to New Hampshire's long arm statute. The court rejected this view.

outside the state, and was personally served, jurisdiction should be established.

Miles further argues that none of this demonstrates an intent to subject a corporation to personal jurisdiction over causes of action arising before the appointment of an agent for service of process. Again, we disagree. We first note that South Dakota has applied its jurisdictional statutes, specifically the long-arm provision in S.D. Codified Laws § 15-7-4, to causes of action arising before its passage. *See Johnson v. Kusel,* 298 N.W.2d 91, 92 (S.D. 1980); S.D. Codified Laws § 15-7-4 (1991). Thus, its courts have demonstrated a willingness to entertain causes of action antedating the jurisdictional basis. Second, the statutory provision concerning withdrawal by a foreign corporation limits the authority of the agent appointed under its terms to causes of action arising while the corporation was authorized to do business in the state. The statute requiring the appointment of such an agent while the corporation is registered to do business within the state, however, contains no such limitations. The specific temporal limitation in the revocation statute, coupled with the absence of any such limitation in the registration statute, suggests that the time of the facts giving rise to the cause of action is irrelevant when an agent appointed pursuant to S.D. Codified Laws § 47-8-15 is personally served.

More fundamentally, this argument misunderstands the nature of general jurisdiction. The South Dakota Supreme Court stated that one subject to its general jurisdiction is subject to suit on any transitory cause of action. *Thomson,* 162 N.W. 373; *Sharkey,* 373 N.W.2d 421. There is no question that the South Dakota courts could exercise

jurisdiction over an individual who moved to South Dakota even though the cause of action arose before he arrived. Because the South Dakota Supreme Court has discerned a state policy to treat out-of-state corporations like residents with respect to when they can be sued, we believe that the time at which the facts giving rise to the cause of action occurred is irrelevant.

Thus, we conclude that the South Dakota courts would find personal jurisdiction to exist on these facts.

B. Due Process

We still must consider whether the due process clause would bar the exercise of jurisdiction over Miles on these facts. This court recently held that a state's requirement that a foreign corporation submit to the jurisdiction of that state's courts in order to qualify to do business did not need to be tested under the due process "minimum contacts" analysis set forth in *International Shoe v. Washington*, 326 U.S. 310 (1945). *See Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196 (8th Cir. 1990). Instead, we held that appointment of an agent for service of process constituted consent to jurisdiction, and the due process clause was thus satisfied. As we are bound by that decision, the only question before us today is whether extending such "consent" to cover causes of action antedating the appointment of the process agent violates due process.

We conclude that the rule announced in *Knowlton* is not changed simply because the cause of action antedated the appointment of an agent for service of process. Although the *Knowlton* court noted that the corporate

defendant there sued had appointed an agent for service of process prior to the facts in question, its decision did not depend on that fact. Instead, the court focused on whether the Minnesota statute in question extended jurisdiction to the facts before it. The court noted that Minnesota "adheres to the prevailing rule, which permits suit on transitory causes of action . . . regardless of where the cause of action arose. . . . " *Id.* at 1200. It continued to "conclude that appointment of an agent for service of process . . . gives consent to the jurisdiction of Minnesota courts for any cause of action, whether or not arising out of activities within the state. Such consent is a valid basis of personal jurisdiction, and resort to minimum-contacts or due process analysis to justify the jurisdiction is unnecessary." *Id.* As a court's general jurisdiction is not limited to causes of action accruing after the basis for general jurisdiction arose, and appointment of an agent for service of process in South Dakota subjects the corporation to general jurisdiction, we conclude that there is no due process objection to South Dakota's exercise of jurisdiction in this case. We note Justice Holmes' observation that "when a power [to accept process] actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act." *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917).

In any case, we could not conclude that Miles is unconstitutionally burdened by having to defend this suit in South Dakota. Even without the appointment of the process agent, Miles should have foreseen similar suits in South Dakota at the time Sondergard consumed Alka-

Seltzer Plus. Miles admits that it distributed Alka-Seltzer Plus for sale throughout South Dakota at the time Sondergard took it. Its sales in South Dakota are "not simply an isolated occurrence, but arise[] from the efforts . . . to serve, directly or indirectly, the market for its product in [South Dakota]." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Thus, Miles had purposely availed itself of the benefits and privileges of South Dakota's laws and economy. *See, e.g., Hanson v. Denckla*, 355 U.S. 220, 253-54 (1957). Its own activities created a connection with South Dakota through which it could reasonably foresee being haled into court in South Dakota. *See, e.g., World-Wide Volkswagen*, 444 U.S. at 296. Had Sondergard consumed the Alka-Seltzer Plus in South Dakota, there would be no question about the constitutionality of South Dakota's personal jurisdiction.

Thus, Miles is left to argue that they could not foresee being sued in South Dakota on *this particular* cause of action. This argument rings hollow, however, when one realizes that Miles does not engage in face-to-face transactions with the buyers of its products, and does not attempt to structure its sales of Alka-Seltzer Plus with regard to whether or not it might be sued in South Dakota. Instead, it sells Alka-Seltzer in every state. Because Miles does not limit who may buy its product or where they may buy it, we cannot conclude that Miles is unconstitutionally burdened by having to defend this suit in South Dakota simply because the plaintiff did not consume its product there. We believe that South Dakota's exercise of personal jurisdiction over Miles would not violate "traditional notions of fair play and

substantial justice." *See. e.g., International Shoe v. Washington*, 326 U.S. 310, 318 (1945).

We therefore reverse the district court's decision denying personal jurisdiction and remand for further proceedings.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 92-1274SDRC

Donald Bruce Sondergard,	*	
	*	
Appellant,	*	Appeal from the United
vs.	*	States District Court
	*	for the District of
Miles, Inc.,	*	South Dakota
	*	
Appellee.	*	(Filed March 29, 1993)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

February 22, 1993

A true copy. /s/ Michael E. Gans

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

MANDATE ISSUED 3/26/93

APPENDIX B

[p. 1] UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

****

DONALD BRUCE SONDERGARD, CIV 91-5122

PLAINTIFF, JANUARY 10, 1992
RAPID CITY,
SOUTH DAKOTA

VS.

MILES INC.,

DEFENDANT.

****

TRANSCRIPT OF ORAL ARGUMENT

BEFORE THE HONORABLE RICHARD H. BATTEY,
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

FOR THE
PLAINTIFF: GLEN H. JOHNSON, ESQ.
Johnson Huffman
Attorneys at Law
3202 West Main
Rapid City, South Dakota 57702

FOR THE
DEFENDANT: DONALD E. SHELY, ESQ.
Dykema Gosset
Attorneys at Law
505 North Woodward Avenue
Suite 3000
Bloomfield Hills, Michigan 58304

PATRICIA MEYERS, ESQ.
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& Bushnell
Attorneys at Law
704 St. Joseph Street
Rapid City, South Dakota 57701

[p. 2] COURT
REPORTER: JUDITH M. THOMPSON
Official Court Reporter
#314 United States Courthouse
515 Ninth Street
Rapid City, South Dakota 57701

(January 10, 1992.)

THE COURT: The matter in hearing this afternoon is in the case of *Sondergard vs. Miles Incorporated.* The plaintiff is in court represented by counsel, Mr. Glen Johnson. The defendant is represented by Ms. Patricia A. Meyers.

The Court has before it a motion for dismissal on a Rule 12, on the grounds of lack of personal jurisdiction, counsel have briefed the case as to that issue, and the Court has prepared itself for oral argument.

Did you wish, counsel, to note the appearance at this time of any other counsel?

MS. MEYERS: Yes, Your Honor. I'd like to move at this time for the admission of Don Shely, pro hac vice pursuant to Local Rule 25. I have filed written motion to that effect and mailed the appropriate fee. I can represent to the Court that Mr. Shely is in fact a member in good standing of the State Bar of Michigan and the United States District Court for the District of Michigan as well,

and Mr. Shely would be arguing on behalf of the defendant today.

I would also like to note the appearance of Mr.

* * *

[p. 5] other points so that we are off on the same ground and perhaps Mr. Johnson can chime in if he doesn't agree. But under the facts of this case, first of all, this case is submitted on the record; as of now, there has been no evidentiary hearing and I contemplate that neither attorney feels that an evidentiary hearing is necessary. Is that your position, counsel?

MR. SHELY: That is our position, Your Honor.

MR. JOHNSON: That's correct, Your Honor.

THE COURT: Now, the case will be decided upon the record. As counsel knows, under Eighth Circuit law, the Court could hold an evidentiary hearing on matters such as this, but if it does not do so, it must do so based upon the record. I have the first chance to be wrong. The Eighth Circuit on the de novo review of this proceeding will be the final arbiter in this case.

The second point that the record should reflect, as I think it does adamantly do so, this was a non-intentional tort which occurred in the state of Utah, some two years or so prior to the time the plaintiff moved to South Dakota. There's no issue about what that is a fact, correct?

MR. SHELY: That's agreed upon, I believe.

MR. JOHNSON: I don't believe it occurred two years before he actually moved to South Dakota, Your Honor, but the events occurred in October of –

* * *

[p. 35] general jurisdiction type of analysis. It is certainly sufficient to go on a consent type.

THE COURT: As I resolve this case, the ultimate burden is yours, but the Court must resolve the facts as it knows now in your favor. The Court must resolve the facts in favor of the non-moving party at this point and if you have a prima facie case of jurisdiction, as I read the Eighth Circuit law on that, the hammer is to come down on your side. You mention the pervasiveness of Alka-Seltzer Plus Cold Medicine. It isn't any question but it probably does appear in every grocery store, drug store, and perhaps some convenience stores in probably every state of the union. You agree to that; you would agree to that, Mr. Shely, wouldn't you?

MR. SHELY: Yes, sir, we would.

THE COURT: All right. I don't know where that leaves me but you go ahead, Mr. Johnson.

MR. JOHNSON: I do want to respond to Mr. Shely's argument that South Dakota corporate statutes are distinguishable from the Minnesota statutes. Reading those statutes, I don't see any distinction. The Minnesota statute basically says a foreign corporation shall be subject to service of process by service on its registered agents. There aren't any words in that statute that limit it to claims arising out of activities either within the state –

* * *

[p. 47] MR. SHELY: Yes. As Your Honor just noted a moment ago, to that extent it would throw out the window International Shoe and its progeny.

THE COURT: All right. I am prepared to rule on this case. Now, I am going to dictate my opinion in the record; it will take probably some time; you needn't await my decision if you wish.

Take a minute rest your fingers a bit.

(Off the record.)

THE COURT: The Court has indicated on the record at the outset the posture of the case and the record should reflect as part of this oral decision the consessions [sic] of counsel as to the facts in this case challenging jurisdiction, brought on motion by the plaintiff Miles, Incorporated [sic], the Court must follow certain predicate rules. One is that plaintiff bears the ultimate burden on the issue of jurisdiction. However, that burden has not been met except by a preponderance of evidence at the trial. And to defeat the motion to dismiss by brought by Miles Incorporated on the grounds of lack of personal jurisdiction, the non-moving party in this case, the plaintiff, Sondergard, need only make a prima facie showing of jurisdiction.

In view of the fact that the Court has not held an evidentiary hearing in this case, the Court must rely upon the pleadings and affidavits – there are no affidavits; [p. 48] there are pleadings and attachments – and look at the facts in the light most favorable to the non-moving party, and that in this case would be the plaintiff, Sondergard.

The appellate court on appeal will make a determination de novo, hence the findings of the Court as to the facts do not bind the appellate court on the issue presented. Briefly revisited, the facts indicate that the defendant is an Indiana corporation which manufactures Alka-Seltzer Plus Cold Medicine and the action involves a complaint by plaintiff, Sondergard, that he was injured on October 27, 1989, by ingesting some of the defendant's product which caused a chemical reaction in his body brought upon by his ingestion of other medicines.

The defendant – or the plaintiff moved to South Dakota, in which he is now a resident sometime after the alleged tortious conduct of the defendant. South Dakota had nothing to do with the tort itself. The defendant, on August 30, 1991, filed with the Secretary of State in an attempt to comply with the South Dakota Foreign Corporation Act, an application for certificate of authority on the basis of which it was issued a certificate of authority to do business in South Dakota. The issue in this case, simply stated, is: can this action be maintained under the law of the State of South Dakota as respects personal jurisdiction? The Court could resolve this matter based upon the issue of consent, [p. 49] but declines to discuss also other rules which would apply to the issue of personal jurisdiction as respects the law generally and as respects this case in particular.

My citation to the predicate rules that I have just set forth is *Dakota Industries vs. Dakota Sportswear,* an Eighth Circuit case, 946 F.2d 1384, Eighth Circuit 1991, an intentional tort case decided by the Eighth Circuit, and the opinion of which was written by the Honorable John R. Gibson, Circuit Judge.

By way of an historical review, the Court points out that as early as 1877 in the case of *Pennoyer vs. Neff,* 5 Otto (95 U.S.) 714, 24 Lawyers' Edition 564, the Supreme Court of the United States held that in absence of a waiver, the presence of a defendant in a state was a necessary prerequisite to a court's asserting personal jurisdiction over that defendant. By historical perspective, there came to be a number of subsequent decisions which developed generally along three lines: first of all, the concept of implied consent was adopted which is typified by the case of *Hess vs. Pawloski,* 47 Supreme Court 632, 1927 case, which sustained personal jurisdiction upon a non-resident using the highways out of state generally based upon the police power of the state to protect its citizens from the operation of motor vehicles. That line of cases following Hess has been extended to other dangerous activities such as aircraft, [p. 50] watercraft, securities violations, hazardous construction work, and so on.

The second line of cases had to do with corporations' consent. Those cases are similar to follow the general concept that a state may require consent before licensing foreign corporations. That's the *Lafeyette Insurance Company vs. French* case, 1856 case, found at 18 Howard (59 US) 404, 15 Lawyers' Edition 451; also a 1882 case of *St. Clair vs. Cox* 1 Supreme Court 354.

And in the third type of line of judicial interpretations of the concept that was embodied in *Pennoyer vs. Neff,* is the corporate "presence" – quote "presence" end quote. This would be the type of cases where the corporation does business in such a manner as to create an inference of presence. That's *Philadelphia and Reading Railroad Company vs. McViven* case, a 1817 case at 37 Supreme

Court 280. In either of the two latter concepts of corporate consent or corporate presence, doing business was the test for a period of time; then came the modern concept or the rule embodied in *International Shoe Company vs. Washington* and its progeny. International Shoe Company is found at – decided in 1945, 66 Supreme Court 154; Justice Black was the justice who wrote the opinion. That was a suit by the state of Washington to collect unemployment taxes against a Missouri corporation. International Shoe held generally, number one, that in order [p. 51] to determine jurisdiction minimum contacts was the test. Its to be considered in the following ways: 1. Presence exists when the activities are continuous and systematic and the activities give rise to the liability sought to be enforced. Now that, to this Court's interpretation, was an acknowledgment of what is now referred to as special jurisdiction, that is, the activities which consisted of a continuous and systematic pervasive type of activities gave rise themselves to the liability sought to be enforced. That's generally come to be known as specific jurisdiction.

Secondly, the casual presence itself is not enough; you can't just sit simply and have an isolated presence in order to base jurisdiction upon that conduct.

3. The continuing activity of substantial [sic] can give rise to distinct activities.

And 4. On occasion single acts may suffice; and I have cited *Hess vs. Pawloski.* Following International Shoe, in 1957, *McGee vs. International Life Insurance* was decided, 78 Supreme Court 199, 355 U.S. 220, involving contacts created over a life insurance policy. In 1958, a

year later, *Hanson vs. Denckla,* 78 Supreme Court 1228, 35 U.S. 230. Approximately 20 years later, in 1977, *Shaffer vs. Heitner,* came on the scene; that's at 97 Supreme Court 22-569, 433 U.S. 186, followed in 1980 by *World-Wide Volkswagen Corporation vs. Woodson,* 100 Supreme Court 559, 444 U.S. [p. 52] 286. And the 1985 case of special jurisdiction which was the *Burger King vs. Rudzewicz* case, 105 Supreme Court 2174, 471 U.S. 462. In Burger King, the plaintiff's claims against the defendant were related to the defendant's forum contacts. Now, the concept of minimum contacts enunciated in International Shoe spawned a number of cases which clarified and somewhat – I guess "clarified" would be a good word – the minimum contacts; one, *Traveler's Health Insurance vs. Commercial of Virginia,* found at 70 Supreme Court 1927, a 1950 case, where a Nebraska violation of the Virginia Blue Sky Law, the insurance sale in the State of Virginia, held that Virginia's jurisdiction was consistent with fair play and due process.

A 1952 case has been referred to here this afternoon, *Perkins vs. Benguet Consolidated Mining,* 72 Supreme Court 413; in that case, Iowa's exercise of jurisdiction over a Philippine corporation or the cause of action did not arise in Ohio, involved a cause of action in, I believe it was, Peru, if I recall; I may be wrong on that. At any rate, the cause of action did not arise in Ohio and the cause of action was unrelated to the business activities of the corporation in the state. But the corporation had been carrying on a continuous and systematic course of conduct and the Supreme Court said that Ohio may or may not exercise jurisdiction in that case. *McGee vs. International* [p. 53] *Life Insurance Company,* 1957 case, I referred

to that and cited it in the oral opinion, involved a contract of insurance issued by a Texas insurance company insuring a life of a California resident. The insurance company was sued in California for the failure to pay death benefits and the Supreme Court's due process was based on a contract which had sufficient contact with California. In the *Hanson vs. Denckla* case that I cited, that established there are limits beyond which due process cannot be stretched. That was a complicated fact situation.

Putting it as simply as I can, it involved a trust instrument which was executed in Delaware by a Pennsylvania domiciliary settler which contained a power of appointment. The settler moved to Florida, he exercised the trust powers of appointment, appointed it to an appointee and the legatees objected to that, normally what you find happens in a case like that. The Florida action by the residuary legatees who challenge exercise of power of appointment was brought in Florida, personal service of Delaware trustee and other interested parties made by mail. The Florida court said it had jurisdiction; the Supreme Court held there was not sufficient contacts with Florida and in that case the Supreme Court discussed the trend since International Shoe. The Court ruled that there must be some act by which the defendant purposely availed itself for the privilege of [p. 54] conducting activities within the forum state, thus invoking benefits and the profession [sic] of its law. *Shaffer vs. Heitner,* which I have also cited, I believe was a return to generally the International Shoe case and the principle set forth therein.

In 1978, *Kulko vs. Superior Court of California* reenforced [sic] *Hanson vs. Denckla,* again applying a purposeful

availment test as applied to minimum contacts. The Supreme Court refused jurisdiction in New York of a New York father who had gone to California to see his infant son.

Then in 1980, *World-Wide Volkswagen Corporation vs. Woodson*, which I have also cited, said that, quote, "Due process clause by insuring the orderly administration of its laws gives a degree of predictability for the legal system that allows potential defendants to structure their primary conduct with some minimum assurance to where that conduct will or will not render them liable to suit." The Court in World-Wide Volkswagen Corporation did not sustain a jurisdictional claim of a personal injury in a personal injury automobile case which occurred in Oklahoma to a New York resident heading to Arizona. The Court said that the stream of commerce concept and foreseeability test was related to actions arising in the forum state.

Then there is the often-quoted case of *Helicopteros Nacionales de Columbia, S.A. vs. Hall,* 104 Supreme Court 1868 [p. 55] where jurisdiction was not found in that case involving substantial facts which would connect Texas to – the Texas Court to the defendant, but nonetheless it was not a systematic and continuous conduct.

The next case that the Court believes is instructive in the determination in our case is *Glater vs. Eli Lilli & Company,* 744 F.2d 213, which was a First Circuit case where there was found no jurisdiction even though the defendant transacted business within the forum state. Cause was unrelated to thereupon no specific jurisdiction

either. *Glater vs. Eli Lilli,* and, incidentally, its predecessor, *Seymour vs. Parke-Davis & Company,* which is found at 423 F.2d 584, 1970, and its successor, *Donatelli vs. National Hockey League,* 893 F.2d 459, First Circuit 1990, another First Circuit case, dealt with the issue of jurisdiction in various contexts. And in Glater, that was a case in which the plaintiff brought a diversity action in the United States Court in New Hampshire against Eli Lilli & Company in January of 1981. She sought damages for personal injuries alleged caused by exposure in utero, D.E.S., in other words, her mother had taken D.E.S. causing defects, damages, personal injuries to her as she was carried in her mother's womb. At the time of the exposure, her mother lived in Massachusetts. For a time she lived in New Hampshire, that is, the plaintiff lived in New Hampshire. She was employed at the New [p. 56] Hampshire office of an insurance company and was transferred to the Massachusetts office in 1980. Further she [sic] when she commenced the action she was a resident of Massachusetts. When she commenced the action at Lilli, the defendant was an Indiana corporation which marketed D.E.S. nationwide since 1947. It had engaged in limited advertisements of its pharmaceutical products in professional trade journals which circulated in New Hampshire. It employed eight sales representatives whose duties consisted in part of providing information concerning Lilli products to certain New Hampshire physicians, pharmacies and hospitals; three of the sales representatives live in New Hampshire. Neither the sales representatives nor Lilli directly sold products in New Hampshire, rather sales are made to individual wholesale distributors, some

of whom are located in New Hampshire. Lilli had appointed no agent to receive service of process. Based upon this record for this Court, the activities of Eli Lilli were much more pervasive in New Hampshire than this Miles is in South Dakota.

Now, as to South Dakota – as to Eighth Circuit cases, in *Morris vs. Barkbuster*, 923 F.2d 1277, Eighth Circuit 1991 case, recent discussion of the jurisdiction theories by Circuit Judge Bowman, in Morris the defendant was not licensed in Minnesota, it had no agents, officers, employees, or property there, nor did it solicit or advertise [p. 57] any business there. It did have a distributor contract with DDC, Diversified Distribution Company, and Barkbuster also had made three trips to Minnesota but plaintiff's claim did not arise out of those claims, out of those trips. Judge Bowman had – page 1280 considered the due process clause of the Fourteenth Amendment over on the jurisdictional issue. Quoted International Shoe and World-Wide Volkswagen Corporation, talked about Helicopteros, at page 1281, and Perkins, also Burger King, in writing for the panel in a 2 to 1 decision, he determined that there was lack of personal jurisdiction. In *Morris vs. Barkbuster*, there was no consent as there was in the case now under consideration. Further, the Court is not unmindful of the cases of *Knowlton vs. Allied Van Lines, Inc.*, 900 F.2d 1196, Eighth Circuit 1990. The case of *Ocepek vs. Corporate Transport, Inc.*, 91-1444 EM, decided December 2, 1991. And *Soo Line Railroad Company, a Minnesota Corporation vs. Hawker Siddeley Canada, Inc.*, 91-1206 Minnesota, an opinion by Judge Jensen, in defining the difference between general and specific jurisdiction, the Court states that specific jurisdiction is jurisdiction over a

defendant when plaintiff's claims arise out of or are related to defendant's contacts within the state. Citing Helicopteros 466 U.S. at 414, note 8, general jurisdiction is jurisdiction over a defendant because of the defendant's, quote, "continuous and systematic earned" – quote – [p. 58] " 'contacts' with the state." Again Helicopteros, note 9.

Under the principles of general jurisdiction, contacts with the forum need not relate to the cause of action itself. The South Dakota long arm statute confers only specific jurisdiction. South Dakota Codified law 15-7-2 provides in part as follows: "Any person is subject to the jurisdiction of the Court of this state as to any cause of action arising from the doing personally through any employee, through an agent, or through a subsidiary, or any of the following acts: 1. Transactions of business within the state. 2. The commission of an act which results in an accrual within the state of tort action. And 14. The commission of an act, that basis of which is not inconsistent with the Constitution of this State or of the Constitution of the United States." The South Dakota long arm statute subparagraph 14 in effect codified what had been a previous law in South Dakota to the effect that the South Dakota long arm statute is as broad as the due process clause of the Fourteenth Amendment.

In *Ventling vs. Kraft* 83 South Dakota 465, 161 NW 2d 29, page 30, the South Dakota Supreme Court said that, quote, "If the terms of statute are plain and clear in their meaning, this Court's function is to give them effect not to amend the statute in order to avoid or produce a particular result. Under the language of the statute the acts forming [p. 59] the basis of jurisdiction and acts

underlying the claim for relief must arise from the same circumstance thus the plain meaning of the meaning [sic] of the statute does not cover general jurisdiction. The action was given rise to the injury in this case, that is, in the case now under consideration took place in Utah and not South Dakota. This does not mean necessarily that general jurisdiction does not apply in South Dakota.

The Court believes that if presented with the factual issue which would support general jurisdiction, this Court believes that the Supreme Court of South Dakota would adopt the concept of general jurisdiction. Even under the concept of general jurisdiction, the Court does not believe that there is jurisdiction in this case. This Court cannot help but believe that to hold otherwise, that to hold general jurisdiction would apply in this case, would be in effect to swallow up all the rules and the mutations of International Shoe and in effect would permit plaintiff to bring actions in South Dakota for any tort committed by the defendant in any other state of the union and it just does not strike the Court as comporting with common sense and the application of the cases I have cited.

Thus, the Court comes down to the issue of what is the effect of two factors: One, the placing by the defendant in a stream of commerce not only in South Dakota but in other [p. 60] states of the over-the-counter medicine which is the subject of this action; and two, the signing of the qualifying to do business in South Dakota under the South Dakota Foreign Business Corporation Act and the interrelation of the two.

In the South Dakota foreign Business Corporation Act, Section 48-8-17 in defining doing business within the state, it states that if a foreign corporation makes a contract with a resident of South Dakota to be performed in whole or in part by either party in South Dakota or if such foreign corporation commits a tort in whole or in part in South Dakota against a resident of South Dakota, such act shall be deemed to be doing business in South Dakota by the foreign corporation and shall be deemed equivalent to the appointment of the foreign corporation of the Secretary of State of the State of South Dakota to be as true and lawful attorney upon whom may be served all lawful process, et cetera. Another section under chapter 47-8 of the South Dakota codified laws provide methods by which the corporation can become qualified in South Dakota. The defendant Miles Incorporated did become incorporated on August 30, 1991, under that act and consented to the appointment of a registered agent which was CT Corporation Systems. Thus the Defendant is licensed in South Dakota and may be sued in South Dakota. Service upon the registered agent would be service upon the defendant.

[p. 61] The Court has been provided with no cases and has been unable to find any which would indicate that a consent to service filed in the State of South Dakota on August 30, 1991, is a consent to service based upon a tort which occurred sometime prior thereto in another state, in this case, the state of Utah.

Based upon the above and foregoing memorandum, oral memorandum, the Court finds that there is neither general jurisdiction nor consent jurisdiction and accordingly, will dismiss the complaint without prejudice.

The Court will be ordering the reporter to complete a transcript of this order to deliver it to the Court for the purpose of perhaps final alteration of the memorandum as dictated in the record. The Court may or may not change the memorandum in certain respects. As indicated, dismissal is without prejudice.

MR. JOHNSON: Could I have a clarification, Your Honor, so that I could make a record, at any rate? You indicated in your oral decision that while you were of the opinion the South Dakota Supreme Court adopted concept of general jurisdiction, that nevertheless, it would not apply in this case, if I understand the Court correctly, because of the fact that qualifying to do business in the state, forming a registered agent and selling over-the-counter medications in and of itself is not sufficient to constitute that or [p. 62] enough to constitute general jurisdiction?

THE COURT: That's my general feeling at this time, counsel. I will revisit that when I see the final draft.

MR. JOHNSON: My only point, Judge: if general jurisdiction applies under a factual scenario that has yet to be developed, I would ask the Court to stay the effect of its order pending discovery in this case and to lift its order on discovery so that the plaintiffs can at least attempt to show the Court general jurisdiction. On the other hand, if the Court is saying general jurisdiction under no circumstances could apply in this particular case, even though the South Dakota Supreme Court would likely in an opinion adopt it, that's a different question.

THE COURT: I will hear from counsel for Miles Inc.

MR. SHELY: I just would put on the record that my understanding, as I believe I have stated earlier, was that counsel stated during his arguments he was now proceeding on a theory of general jurisdiction, Your Honor.

THE COURT: Well, I am going to deny the motion at this time. I will be re-examining my oral memorandum decision. The Court of Appeals recommends that judges do pronounce oral decisions from the bench. It's a process which they encourage. It's not a process which is to be used to do violence to time constraints. I will look at the opinion when it's completed, make any modifications on it [p. 63] before it's signed; I will consider your motion. I anticipate that that final draft will not be completed for ten days to two weeks. I am leaving for conference in the morning and will be gone all week, and the following week I do have a civil case that I am trying.

Court will be in recess.

(End of transcript.)

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

DONALD BRUCE SONDERGARD, Plaintiff vs. MILES INC., Defendant.	CIV. 91-5122 ORDER DENYING MOTION TO RECONSIDER (Filed January 24, 1992)

Plaintiff reurges the Court to reconsider its memorandum opinion rendered in open Court on January 10, 1992. Defendant's counsel has responded by letter dated January 21, 1992.

Prior to rendering its decision of January 10, 1992, the Court had considered *Thompson v. Meridian Life Ins. Co.*, 162 N.W. 373 (S.D. 1917) and *Sharkey v. Washington Nat'l Ins. Co.*, 373 N.W.2d 421 (S.D. 1985). These cases involved matters based upon insurance contracts and the specific statute relating thereto, SDCL 58-6-39.

The Court therefore determined in announcing its decision that *Thompson* and *Sharkey* were inapposite. The South Dakota long-arm statute, SDCL 15-7-2(1) and (2), applies. The plaintiff's cause of action arose in Utah, not South Dakota. Accordingly, it is

ORDERED that plaintiff's motion is denied.

Dated this 24th day of January, 1992.

BY THE COURT:

/s/ Richard H. Battey
RICHARD H. BATTEY
UNITED STATES
DISTRICT JUDGE

ATTEST:
WILLIAM F. CLAYTON, CLERK

By: /s/ Kathleen A. Jeffries
Deputy Clerk

(SEAL)

APPENDIX D

Mary M. KNOWLTON, Appellant,

v.

ALLIED VAN LINES, INC., and Schick Movers, Inc., Appellees.

No. 89-1402

United States Court of Appeals
Eighth Circuit

Submitted Oct. 9, 1989

Decided April 5, 1990

Minnesota resident who was injured out of state in motor vehicle accident with van owned by Iowa corporation brought suit to recover for injuries. The United States District Court for the District of Minnesota granted defendant's motion to transfer case to the United States District Court for the Southern District of Iowa, and that District Court, Harold D. Vietor, Chief Judge, dismissed on limitations grounds. Plaintiff appealed. The Court of Appeals, Arnold, Circuit Judge, held that van line company's appointment of Minnesota agent for service of process operated as consent to jurisdiction of Minnesota courts, and provided court with basis for exercising personal jurisdiction independently of long-arm statutes.

Vacated and remanded with directions to retransfer.

Michael W. McNabb, Burnsville, Minn., for appellant.

Michael C. Lindberg, Minneapolis, Minn., for appellees.

Before ARNOLD and MAGILL, Circuit Judges, and FLOYD R. GIBSON, Senior Circuit Judge.

ARNOLD, Circuit Judge.

Mary Knowlton began this action for personal injuries in the United States District Court for the District of Minnesota. The defendants moved to dismiss for lack of jurisdiction over their persons. The District Court agreed that it lacked jurisdiction but instead of dismissing the complaint it transferred the case to the Southern district of Iowa under 28 U.S.C. § 1406(a). That court then dismissed the complaint as barred by the Iowa two-year statute of limitations. The plaintiff appeals. She does not deny that the Iowa statute, if it applies, bars her action. She argues instead that the Minnesota district court in fact had jurisdiction over the person of the defendant Allied Van Lines, Inc. It was therefore error for that court to transfer the case to the Iowa district court under Section 1406(a). She asks that the case be transferred back to Minnesota. (The Minnesota statue of limitations would not bar the action.) We agree with the position taken by the plaintiff.

I.

On June 3, 1982, Mary Knowlton was on her way from her home in Minnesota to a family reunion in Colorado. She was driving through Iowa and approaching the City of Atlantic when her car and a moving van behind her collided. The van had been traveling from Iowa to Nebraska. Merchants Transfer, an Iowa corporation with its principal office in Iowa, operated the van as agent and under license of Allied Van Lines. Allied is a Delaware corporation whose principal office is located in Illinois. Allied does business in Minnesota and, at the time of the

accident, had appointed a registered agent in that state to receive service of process pursuant to Minn.Stat. § 303.10.[1]

In May of 1988, Ms. Knowlton filed this case against Allied and Schick Movers, the successor of Merchants Transfer, in the United States District Court for the district of Minnesota.[2] Knowlton, by the time of filing a citizen of Colorado, invoked the court's jurisdiction under 28 U.S.C. § 1332. Complete diversity existed among the parties. The Sheriff of Hennepin County, Minnesota, then served the complaint and summons upon CT Corporation – the registered agent appointed by Allied Van Lines to receive service of process under Minn.Stat. § 303.10. Allied moved to dismiss the action for lack of personal jurisdiction and improper venue or, alternatively, to transfer venue under 28 U.S.C. § 1404(a) for the convenience of the parties and witnesses.

The District Court for the District of Minnesota held that it lacked personal jurisdiction over the defendant.

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[1] Like many states, Minnesota requires that all foreign corporations wishing to transact business within its boundaries comply with its Foreign Corporation Act, Minn.Stat. § 303 *et seq.*, which, among other things, requires a foreign corporation to appoint an agent for service of process, failing which that corporation will be barred from maintaining an action in Minnesota. If a foreign corporation complies with the Act, it will possess "within the state the same rights and privileges that a domestic corporation would possess . . . , and shall be subject to the laws of this state." Minn.Stat. § 303.09

[2] The plaintiff subsequently admitted that the District Court in Minnesota could not exercise personal jurisdiction over Schick Movers, and she dropped her claim against Schick.

The Court thought its only means of obtaining personal jurisdiction over an out-of-state defendant was through the Minnesota long-arm statute, Minn.Stat. § 543.19, and the facts in this case could not support an invocation of that statute. The Court reasoned that Subdivision 3 of the statute requires a connection between the cause of action and business conducted in Minnesota, and that such a connection was not present here. The Court believed that a foreign corporation's designation of a registered agent for service of process under Minn.Stat. § 303.10 was not sufficient consent for the Court to assert personal jurisdiction over it. The Court then transferred the case to the District Court for the Southern District of Iowa under 28 U.S.C. § 1406(a). Shortly after the transfer, Allied moved that Court to dismiss the complaint with prejudice because the plaintiff's action was barred by the Iowa two-year statute of limitations for personal-injury claims. Iowa Code § 614.1.2. The Court granted the motion and dismissed the case with prejudice on February 17, 1989.

II.

The plaintiff contends that the Minnesota court erred in concluding that jurisdiction over a non-resident defendant must be obtained, if at all, pursuant to the long-arm statute. She says the Court had jurisdiction over allied because it consented to be sued in the State of Minnesota by appointing a registered agent to receive service of process.

Traditionally, the basis of jurisdiction over a person was territorial sovereignty. If a person, natural or corporate, was physically present in a state, that state's courts

had jurisdiction over the person. At bottom, the basis of jurisdiction was physical power. See *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1877). Then , as transportation and communications improved, and interstate business increased the needs of modern society called forth new legal concepts. The doing of various acts within the State – for example, driving an automobile – was equated, by statute, with consent or submission to the jurisdiction, even by nonresidents. See *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927). This trend culminated in the so-called long-arm statutes, which asserted jurisdiction over nonresidents, either individual or corporate, who made contracts, committed torts, or caused certain consequences within the State. See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). If the act done fit the definitions of state law, and if "traditional conception[s] of fair play and substantial justice," *International Shoe Co.*, 326 U.S. at 320, 66 S.Ct. at 160, were not violated, jurisdiction was present. This kind of jurisdiction, though, was valid only as to claims related to the in-state activity specified in the long-arm statute. It has come to be known as "specific jurisdiction." See *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 n. 8, 104 S.Ct. 1868, 1872 n. 8, 80 L.Ed.2d 404(1984). It exists only as to claims that have a sufficiently substantial connection or "nexus" with whatever the defendant has done to bring it within the long-arm law.

The district Court analyzed this case under the Minnesota long-arm statute, correctly holding that the plaintiff's claim neither arose out of nor was related to

anything that Allied did in Minnesota. There are two other major ways of getting jurisdiction over someone's person, however. First, there is "presence" – the conduct of business within a state on a sustained and systematic basis. If a defendant is "present" in the State in that sense, jurisdiction over it exists under the old rubric of physical power or sovereignty. See *Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952). And this jurisdiction – subject always to whatever outer limits the Due Process Clause imposes – is "general." It exists as to all claims against the defendant, whether or not arising out of or related to activities within the State. See *Helicopteros*, 466 U.S. at 414 n. 9, 104 S.Ct. 1872 n. 9. Plaintiff in this case claims that Allied's business activities in Minnesota are so pervasive that jurisdiction exists even as to claims, such as this one, that are not related to those activities. Because we hold that there is jurisdiction based on consent, we find it unnecessary to pursue this aspect of the analysis.

Consent is the other traditional basis of jurisdiction, existing independently of long-arm statues. Personal jurisdiction, unlike subject-matter jurisdiction, is primarily concerned with fairness to individual parties. Objections to jurisdiction over the person may be waived, either expressly or by not asserting them in a timely manner. A defendant may voluntarily consent or submit to the jurisdiction of a court which otherwise would not have jurisdiction over it. See *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). One of the most solidly established ways of giving such consent is to designate an agent for service of process within the State.

The district Court thought such a designation was not the equivalent of consent to jurisdiction. This is where we disagree. The whole purpose of requiring designation of an agent for service is to make a nonresident suable in the local courts. The effect of such a designation can be limited to claims arising out of in-state activities, and some statues are so limited, but the Minnesota law contains no such limitation. Section 303.13, Subdivision 1(1), provides simply that "[a] foreign corporation shall be subject to service of process . . . [b]y service on its registered agent. . . . " There are no words of limitation to indicate that this type of service is limited to claims arising out of activities within the state. By contrast, under § 303.13 subdivision 1(2), if a foreign corporation authorized to transact business in Minnesota fails to appoint a local registered agent upon whom service of process may be had, then service can be made on the Secretary of State, provided, however, that if the corporation has withdrawn from the state, this type of service is valid "only when based upon a liability or obligation of the corporation incurred within this state or arising out of any business done in this state by the corporation prior to the issuance of a certificate of withdrawal." These words of limitation, occurring in the very same section of the statute, clearly indicate that the Legislature knew how to limit the purposes of service of process when it wanted to do so, and that provisions for service without such an express limitation are intended to apply to any claims made against a corporation with a registered agent within the state. In addition, Subdivision 4 of the same section provides that service of process authorized by the section is supplementary and additional to other methods of

service of process. The fact in other words, that the long-arm statute, § 543.19, provides its own method of service (simple personal service on the defendant outside the state) does not mean that it supersedes § 303.13. See also § 543.19, subdivision 4: "Nothing contained in this section shall limit or affect the right to serve any process in any other manner now or hereafter provided by law . . ."

The Supreme Court of Minnesota has interpreted the statues in just this way. It adheres to the prevailing rule, which permits suit on transitory causes of action, such as those for personal injuries, regardless of where the cause of action arose, so long as the defendant is present in the State, or has consented to its jurisdiction, and has been served in accordance with law. See *Erving v. Chicago & N.W. Ry. Co.*, 171 Minn. 87, 214 N.W. 12 (1927), (interpreting the statutory predecessor of Minn.Stat. § 303.13). Cases in the federal courts are in accord with this construction. *Arney v. Central Electric & Gas Co.*, 66 F.Supp. 401 (D.Minn.1946) (Nordbye, J.); *Bowles v. L.D. Schreiber & Co.*, 56 F.Supp, 814 (D.Minn.1944). We conclude that appointment of an agent for service of process under § 303.10 gives consent to the jurisdiction of Minnesota courts for any cause of action, whether or not arising out of activities within the state. Such consent is a valid basis of personal jurisdiction, and resort to minimum-contacts or due-process analysis to justify the jurisdiction is unnecessary. See *Bauxites*, 456 U.S. at 703, 102 S.Ct. at 2104. Appointment of a registered agent for service is not one of the specific types of consent listed by the Supreme Court in the cited case, but it is nevertheless a traditionally recognized and well-accepted species of general consent, possibly omitted from the Supreme Court's list

because it is of such long standing as to be taken for granted. We hold, in short, that the United States District Court for the District of Minnesota did, by virtue of consent, have jurisdiction over the person of the defendant Allied Van Lines, Inc.

It also appears that Allied has consented to suit in Minnesota under 49 U.S.C. § 10330. Neither side cited this statute to us, but we add a few words about it for the guidance of the bar. This section requires every interstate carrier subject to the jurisdiction of the Interstate Commerce Commission to designate an agent for service of process in each state in which it operates. The carrier must also file a written copy of that designation with the proper state authorities. At the oral argument, Allied admitted that it has appointed an agent in Minnesota pursuant to this statute, and that that agent is the same one served in this case. This designation of an agent, in accordance with federal law, also operates as consent to the personal jurisdiction of the Minnesota courts. See *Shapiro v. Southeastern Greyhound Lines*, 155 F.2d 135 (6th Cir.1946) (action in an Ohio federal court against a Kentucky corporation; the plaintiff was from Illinois, and the accident occurred in Georgia; jurisdiction over the person upheld because the corporation had appointed an agent in Ohio pursuant to 49 U.S.C. § 321(c), predecessor to the present 49 U.S.C. § 10330).

III.

It follows that the judgment of the District Court in Iowa, although correct on its own terms, must be vacated, and the cause remanded with instructions to retransfer

this case to the District Court in Minnesota. Allied contends, entirely apart from considerations of jurisdiction over its person, that the transfer from Minnesota to Iowa was correct because venue was improper in Minnesota, but we cannot agree. Because Schick has dropped out as a co-defendant, the District of Minnesota is now a district in which all defendants (that is, Allied) reside. Venue is proper there in a diversity case. 28 U.S.C. § 1391(a). It is proper to assess the propriety of venue on the basis of circumstances as they now exist, as opposed to the state of affairs that obtained when the complaint was first filed against two defendants. See *Newman-Green, Inc. v. Alfonzo-Larrain*, ___ U.S. ___, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989).

When the case gets back to the District Court for the District of Minnesota, it will still be open to Allied to file a motion for transfer of venue under 28 U.S.C. § 1404(a). This section assumes that venue is proper in the court where the action is initially filed, and also that that court has jurisdiction over the person of the defendant. It authorizes transfer, in such cases, in the interests of justice and for the convenience of parties and witnesses. Considerations of inconvenience, including the location of witnesses and other evidence, can be addressed under this provision. If a motion for transfer under § 1404(a) is made, the District Court should of course consider it, and we express no view on the merits of such a motion. We note, however, that if the motion is granted, and the case comes back to the United States District Court for the Southern District of Iowa, the law of the transferor forum, Minnesota, including its choice-of-law rules, would govern. *Van Dusen v. Barrack*, 376 U.S. 612, 84 S.Ct. 805, 11

L.Ed.2d 945 (1964). in other words, if Minnesota would apply its own statute of limitations to this case, the same statute must be applied by the District Court in Iowa in the event of a re-transfer. This is a key distinction between transfers under § 1404(a) and those under § 1406(a). In the latter kind of case, the law of the transferee forum controls. That is of course why the Iowa district court dismissed the present case on the basis of the Iowa statute of limitations.

The judgment of the United States District Court for the Southern District of Iowa is vacated, and this cause is remanded to that Court with directions to re-transfer it to the United States District Court for the District of Minnesota. That Court should then conduct further proceedings consistent with this opinion.

It is so ordered.

Supreme Court, U.S.
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No. 92-1817

In The

Supreme Court of the United States

October Term, 1992

MILES INC.,

Petitioner,

v.

DONALD BRUCE SONDERGARD,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. IS THE REGISTRATION TO DO BUSINESS AND APPOINTMENT OF A REGISTERED AGENT FOR SERVICE OF PROCESS SUFFICIENT "CONSENT" TO IN PERSONAM JURISDICTION BY A FOREIGN CORPORATION WHERE THE CAUSE OF ACTION AROSE OUTSIDE THE FORUM STATE?

II. IF A FOREIGN CORPORATION REGISTERS TO DO BUSINESS, APPOINTS AN AGENT FOR SERVICE OF PROCESS, AND OFFERS ITS PRODUCT FOR SALE THROUGHOUT THE FORUM STATE, HAS THAT CORPORATION ESTABLISHED SUFFICIENT CONTACTS WITH THE FORUM STATE TO UPHOLD THE EXERCISE OF GENERAL JURISDICTION?

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No. 92-1817

In The

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October Term, 1992

MILES INC.,

Petitioner,

v.

DONALD BRUCE SONDERGARD,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Miles Inc. ("Miles") manufactures Alka-Seltzer Plus Cold Medicine, which it distributes throughout the United States including South Dakota. Miles had applied to the South Dakota Secretary of State for a Certificate of Authority to transact business in South Dakota and was granted such authority in August 1991. At the same time, Miles appointed CT Corporation System as its registered agent in the State of South Dakota.

In October 1989 while residing in Utah, Respondent Donald Sondergard suffered a stroke after consuming Alka-Seltzer Plus Cold Medicine. The stroke was caused

by a chemical interaction of Alka-Seltzer Plus with a prescription anti-depressant he was taking. Sondergard thereafter moved to South Dakota where this lawsuit was commenced in October 1991, two months after Miles had registered to do business and appointed CT Corporation as its agent for process in South Dakota.

Upon Miles removal of the case to the United States District Court for the District of South Dakota, Western Division, the district court immediately granted Miles' Motion to Stay Discovery[1], and thereafter, Miles' Motion to Dismiss on personal jurisdiction grounds. The District Court reasoned that, while the concept of general jurisdiction would be adopted by the South Dakota Supreme Court, and further that by registering to do business and appointing a resident agent for service of process, Miles had consented to the jurisdiction of South Dakota Courts, nonetheless, the exercise of personal jurisdiction over Miles could only take place for torts committed by Miles within the state of South Dakota after it had registered to do business. See District Court Oral Decision (Petition Appendix A35, 36).

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[1] The District Court granted Miles' Motion to Stay Discovery by Order of December 12, 1991. Contrary to Miles' assertion, Mr. Sondergard's counsel did not waive an evidentiary hearing on the nature and extent of Miles' contacts with South Dakota. In fact, on January 15, 1992, Mr. Sondergard filed a Motion to Reconsider or Alternatively Stay the Court's Decision on Miles' Motion to Dismiss Pending Limited Discovery. The Court denied this Motion and entered a Judgment dismissing the case without prejudice.

The Court of Appeals for the Eighth Circuit reversed, holding that when a foreign corporation expressly consents to jurisdiction in the forum state by registering to do business and appointing an agent for process, the minimum contacts/due process analysis of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) becomes unnecessary. *Sondergard v. Miles, Inc.*, 985 F.2d 1389, 1396 (8th Cir. 1993). *See also, Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196 (8th Cir. 1990).

Moreover, the Eighth Circuit found that Miles' contacts with the State of South Dakota were, nonetheless, sufficient to satisfy the requirements of *International Shoe* and its progeny. Miles had admitted that it distributed Alka-Seltzer Plus for sale throughout South Dakota at the time Mr. Sondergard ingested it. The Eighth Circuit reasoned that Miles had purposely availed itself of the benefits and privileges of South Dakota's laws from its efforts to market its product in South Dakota, and that South Dakota's exercise of personal jurisdiction over Miles would not violate traditional notions of fair play and substantial justice.

REASONS FOR DENYING THE PETITION

Petitioner Miles claims that *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) makes a foreign corporation's express consent to personal jurisdiction dependent nevertheless upon a minimum contacts analysis to satisfy due process and that Miles' contacts with the State of South Dakota are insufficient to support the exercise of personal "long-arm" jurisdiction. Miles therefore asserts

that the Eighth Circuit's opinion in this case is wholly inconsistent with other federal precedent, and that apparent conflict and confusion necessitates review by the Supreme Court.

The genesis of any confusion is Miles' interpretation of the authority it cites, and not any fundamental conflict or disagreement among the various decisions of other circuits or this Court. While addressing the issue of general jurisdiction, Miles artfully mixes the significantly different factual and legal concepts of implied and express consent to jurisdiction and in so doing creates a conflict that otherwise does not exist.

In consequence, and contrary to the manner in which Miles incorrectly characterizes the status of the law, the Supreme Court recognizes that by appointing an agent for service of process, a foreign corporation expressly consents to the jurisdiction of the forum state. And in any event, given Miles' substantial business contacts with the State of South Dakota, the due process analysis of *International Shoe* is undoubtedly satisfied. Because of these facts, the instant case is nothing more than a typical general jurisdiction case in which a foreign corporation has registered to do business, appointed an agent for service of process, and purposefully directed its activities toward the forum state. Because it is fact specific and the Eighth Circuit's decision is based on long standing authority, this case does not present the novel opportunity to clear up the perceived conflict that Miles claims exists.

I. THE EIGHTH CIRCUIT'S RULING THAT PERSONAL JURISDICTION MAY CONSTITUTIONALLY BE BASED SOLELY ON THE APPOINTMENT OF A REGISTERED AGENT IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

In considering the issue of express consent to personal jurisdiction, the Eighth Circuit observed:

> "that appointment of an agent for service of process . . . gives consent to the jurisdiction of Minnesota courts for any cause of action, whether or not arising out of activities within the state. Such consent is a valid basis of personal jurisdiction, and resort to minimum-contacts or due-process analysis to justify the jurisdiction is unnecessary."

Sondergard v. Miles, Inc., 985 F.2d at 1396 (quoting *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d at 1200).[2] After addressing the differences between specific and general jurisdiction, the Eighth Circuit did not find that a conflict existed over the recognition of implied and express consent, nor that it was necessary to choose one rule over the other. Rather, the Eighth Circuit recognized the existence of express consent to jurisdiction, and cited both circuit court and Supreme Court authority as support. *Sondergard*, 985 F.2d at 1392, 1395-97. *See also, Knowlton*, 900 F.2d at 1199-1200.

Miles principally relies on three circuit court cases for the proposition that the appointment of an agent for

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[2] *See also, Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3rd Cir. 1991).

service of process, without more, is not sufficient to confer personal jurisdiction. *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir. 1992); *Sandstrom v. Chemlawn Corp.*, 904 F.2d 83 (1st Cir. 1990); *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745 (4th Cir.), cert. denied, 404 U.S. 948 (1971). On close examination, however, it is clear that the cases above were decided in the context of the forum state's long-arm statute – applying the principles of implied consent. Moreover, the same cases contain significantly different factual circumstances than are present here.

In this case, the Eighth Circuit was specifically asked to decide whether the act of appointing an agent for service of process automatically confers jurisdiction over a corporation on any cause of action (i.e., jurisdiction based on express consent). In contrast, the cases cited by Miles do not specifically address the issue of express consent, but rather, proceed directly to the issue of whether personal jurisdiction exists, if at all, under the "minimum contacts" analysis (i.e., implied consent) of *International Shoe* and its progeny. In other words, the cases cited by Miles essentially treat the act of appointing an agent for service of process as only one more "contact" with the forum state, and not as an independent source of jurisdiction.

Only one of the above cases cited by Miles appears to address the question of express consent. *See, Siemer v. Learjet*, 966 F.2d at 183. However, the court in *Siemer* pointed out that "[n]o Texas state court decision has held that [the Texas Business Corporation Act] acts as a consent to jurisdiction over a corporation in a case such as ours – that is where plaintiffs are non-residents and the

defendant is not conducting substantial activity within the state." *Id.* Unlike the Eighth Circuit's analysis of South Dakota law, the Siemer court was unable to locate Texas authority recognizing express consent to general jurisdiction. The Siemer court simply proceeded to decide the case on the implied consent (minimum contact) principles of *International Shoe*. Moreover, in this case, Donald Sondergard was and is a resident of the state of South Dakota, and Miles did and continues to do substantial business in the state.

Contrary to Miles' claims, the First Circuit does recognize express consent as a valid basis for obtaining personal jurisdiction over a foreign corporation. In *Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695 (1st Cir. 1984), the plaintiff asserted jurisdiction based upon personal service of the defendant's registered agent. The defendant claimed that service of process would be "required or permitted by law" only if the corporation could be served pursuant to New Hampshire's long-arm statute. The Court rejected defendant's view. *Id.* at 697.

The First Circuit in *Holloway* observed that, "[i]t is well-settled that a corporation that authorizes an agent to receive service of process in compliance with the requirements of a state statute, consents to the exercise of personal jurisdiction in any action that is within the scope of the agent's authority." *Id.* (citing *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 170-71 (1939); *Pennsylvania Fire Insurance Co.*, 243 U.S. 93, 95 (1917); Restatement (Second) of Conflicts of Laws § 44 (1971)). Though the *Holloway* Court found some causal connection between the defendant's activities in the forum state and plaintiff's injury, the clear import of the case is that by

appointing an agent for service of process, a foreign corporation voluntarily consents to the jurisdiction of that state's courts.[3]

The Eighth Circuit's decision is likewise consistent with the rule in *Neirbo*, and *Pennsylvania Fire*, and with other Supreme Court precedent decided after *International Shoe*. *See e.g.*, *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888 (1988); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952).[4]

Although parties may not waive subject matter jurisdiction, they may waive personal jurisdiction. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).[5] Therefore, consent has been recognized as a basis for the exercise of general personal jurisdiction.

Express consent has been found to be a basis for jurisdiction when a foreign corporation appoints an agent for service of process. *See, Neirbo*, 308 U.S. at 170-71 and

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[3] *See also, General Contracting and Trading v. Interpole, Inc.*, 940 F.2d 20, 22 (1st Cir. 1991) (citing *Holloway, Knowlton* and *Pennsylvania Fire*); *Ytuarte v. Gruner*, 935 F.2d 971 (8th Cir. 1991); *Deines v. Vermeer Mfg. Co.*, 752 F.Supp. 989 (D.Kan. 1990); *Anderson v. U.S.*, 220 F.Supp. 769 (E.D.Penn. 1963); *Marshall v. Mole Constructors*, 193 F.Supp. 617 (W.D. Penn. 1961); *Arney v. Central Electric & Gas Co.*, 66 F.Supp. 401 (D.Minn. 1946).

[4] *See, Sternberg v. O'Neil*, 550 A.2d 1105 (Del.Supr. 1988) for a comprehensive examination of express statutory consent to jurisdiction by means of appointing a registered agent for service of process.

[5] *See also, Hoffman v. Blaski*, 363 U.S. 335 (1960).

Pennsylvania Fire, 243 U.S. at 95. Justice Holmes in *Pennsylvania Fire*, concisely summarized the applicable principle as follows:

> The Defendant had executed the power of attorney that made service upon the superintendent the equivalent of personal service. If by a corporate vote it had accepted service in this specific case, there would be no doubt of the jurisdiction of the state court over a transitory action of contract. If it had appointed an agent authorized in terms to receive service in such cases there would be equally little doubt. It did appoint an agent in language that rationally might be held to go to that length. The language has been held to go to that length, and the construction could not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assert.

243 U.S. at 95. The unanimous opinion, written by Justice Holmes, held that Missouri could constitutionally exercise general jurisdiction over the defendant foreign corporation, and "not deprive the defendant of due process," even though its only apparent contact with Missouri was its designation of the Missouri Superintendent of Insurance as its registered agent. *Id.*

Petitioner Miles claims that the Supreme Court's recognition of express consent to jurisdiction came to an end with the decision in *International Shoe*. Arguing that due process depends upon the quality and nature of the activity of the defendant in the forum state, Miles maintains that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe*." *See, Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).

When read in their proper context, however, the holdings in *International Shoe*, and other Supreme Court cases decided thereafter, are entirely consistent with the continued viability of the earlier holding in *Pennsylvania Fire*.[6]

Perkins v. Benguet Mining Co., 342 U.S. 437 (1952), upheld the constitutional validity of an exercise of *in personam* general jurisdiction with respect to a claim unrelated to the foreign corporation defendant's forum activity. The context of the case involved the application of the forum state's long-arm statute, and a search for minimum contacts. It was necessary for the *Perkins* Court to conduct a minimum contact analysis because the foreign corporation was not registered to do business in the forum state, and had not appointed an agent for service of process. Nevertheless, *Perkins* reaffirmed the principle that there would have been no need to search for minimum contacts if express consent had been given:

> Today if an authorized representative of a foreign corporation be physically present in the state of the forum and be there engaged in activities appropriate to accepting service and receiving notice on its behalf, we recognize that there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state

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[6] *See In Re Des Cases*, 789 F.Supp. 552, 591 (E.D.N.Y. 1992) ("Although the Supreme Court has not directly pronounced on the subject since 1945, the constitutionality of the traditional practice of asserting general jurisdiction solely on the basis of a corporation's being licensed to do business in the forum seems to have survived *International Shoe*. *See Burnham v. Superior Court*, 495 U.S. 604 (1990) (plurality opinion) (*International Shoe* did not supplant long – and widely – accepted methods of asserting jurisdiction")).

> through such service of process upon that representative. 342 U.S. at 444.

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), continued the rationale that due process considerations are different when jurisdiction is based on implied consent rather than on express consent. When jurisdiction is based on implied consent, "[t]he Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.' " *Id.* at 471-72 (citing *International Shoe*, 326 U.S. at 319). However, immediately after stating this general proposition, the *Burger King* Court reiterated the position that personal jurisdiction is waivable:

> [w]here a forum seeks to assert specific jurisdiction over an out-of-state defendant *who has not consented* to suit there, due process is satisfied if the defendant has minimum contacts with the forum.

Burger King, 471 U.S. at 472. (emphasis added). *Burger King* and *Perkins* thus reaffirm that due process is satisfied by express consent, since express consent constitutes a waiver of all other personal jurisdiction requirements.

Bendix Autolite Corp. v. Midwesco Enterprises, 486 U.S. 888 (1988) also appears to accept the express consent rationale. The issue in *Bendix*, as in *Perkins*, involved a forum state attempting to assert jurisdiction over an unregistered foreign corporation. The Court stated:

> [D]esignation of an agent subjects the foreign corporation to the general jurisdiction of the Ohio courts in matters to which Ohio's tenuous relation would not otherwise extend. *Cf. World-*

> *Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The Ohio statutory scheme thus forces a corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense, remaining subject to suit in Ohio and perpetuity. Requiring a foreign corporation to appoint an agent for service in all cases and to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a significant burden.

486 U.S. at 891. Based on the above decisions, and the Eighth Circuit's analysis of both federal and South Dakota state law, it is clear that express consent remains a valid means of obtaining personal jurisdiction over a foreign corporation. The Eighth Circuit's decision hardly presents a pathbreaking approach to the exercise of general jurisdiction. It is consistent with the holdings of the Supreme Court and should not be reversed.

II. THE EIGHTH CIRCUIT'S ALTERNATIVE RULING THAT MILES' BUSINESS ACTIVITIES IN SOUTH DAKOTA WERE SUFFICIENT TO SUPPORT *IN PERSONAM* JURISDICTION IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS AND THE SUPREME COURT.

Notwithstanding the Eighth Circuit's holding that Miles had expressly consented to the jurisdiction of South Dakota courts by appointing an agent for service of process, the Court alternatively proceeded to assess the quality and quantity of Miles' contacts with South Dakota and

found that Miles' forum contacts were sufficient to support the exercise of general jurisdiction. However, Miles contends that even under the application of general jurisdiction, Miles is not amenable to suit in South Dakota.

Miles cites *Siemer* and *Ratliff* for the proposition that the mere sale of a defendant's products in the forum state is not sufficient to obtain jurisdiction consistent with the Due Process Clause. That is an over generalization, however. A close examination of the facts in both cases reveals that the quality and quantity of defendant's contact with the forum state were minimal compared to Miles' presence and sales in South Dakota.

Ratliff involved a consolidated appeal by two drug companies who were sued for injuries caused by the use of their products. The forum activity of one company was limited to "solicitation by mail to dealers and wholesalers, and the mailing of promotional literature to approximately 650 doctors on its mailing lists." 444 F.2d at 746. The other company had actually registered to do business in the state, and had appointed an agent for service of process. *Id.* That same company also maintained five detail men in the state who promoted the companies' products through personal contacts with doctors and drugstores throughout the state. *Id.* However, "their primary responsibility is the promotion of drugs, not the actual sale of them." *Id.*

As the Court in *Ratliff* aptly pointed out, "[a]pplying for the privilege of doing business is one thing, but the actual exercise of that privilege is quite another." *Id.* at 748. Neither drug company did substantial business in the forum state. In contrast, Miles admits that Alka-

Seltzer Plus probably does appear on the shelves of grocery and drug stores in every state.

Likewise, in *Siemer*, defendant Learjet had registered to do business and appointed an agent for service of process in the forum state of Texas. However, only slightly over one percent of Learjet's sales occurred in Texas – not amounting to substantial activity according to the Court. 966 F.2d at 183.

Miles also cites other circuit court opinions for the same proposition. *See e.g., Glater v. Eli Lilly & Co.*, 744 F.2d 213 (1st Cir. 1984) and *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987). In *Glater*, defendant Eli Lilly employed sales representatives in the forum state, marketed its products nationwide, and advertised its products in journals circulated in the forum state. However, neither the sales representatives nor Eli Lilly directly sold products in the forum state, nor had Eli Lilly appointed an agent to receive service of process.

The First Circuit in *Glater* found that Eli Lilly's contacts with the forum state were "indistinguishable" from a similarly situated defendant drug company in *Seymour v. Parke, Davis & Co.*, 423 F.2d 584 (1st Cir. 1970). *Glater*, 744 F.2d at 217. In *Seymour*, the First Circuit held that where "defendant's only activities consist of advertising and employing salesmen to solicit orders, we think that fairness will not permit a state to assume jurisdiction." *Seymour*, 423 F.2d at 586-87. Once again, Miles' contacts with the State of South Dakota are more continuous, systematic and pervasive then defendant's contacts in *Glater* or *Seymour*.

In *Bearry*, defendant Beech Aircraft sold $250,000,000 worth of products in the forum state of Texas. However, the Fifth Circuit found that these individual sales did not amount to the type of continuous and systematic contacts sufficient to support general jurisdiction. Beech Aircraft made an effort to limit its exposure to general jurisdiction. The Fifth Circuit held:

> Beech exercised its right to structure its affairs in a manner calculated to shield it from the general jurisdiction of the courts of other states such as Texas, carefully requiring the negotiation, completion, and performance of all contracts in Kansas. Beech has not afforded itself the benefits and protection of the laws of Texas, but instead has calculatedly avoided them.

818 F.2d at 375-76. Significantly, Beech Aircraft had never qualified to do business nor maintained an agent for service of process in Texas. *Id.* at 372.

By comparison Miles, unlike the defendant's mentioned above, purposefully sought out the South Dakota market for the sale of its product, registered to do business and appointed an agent for service of process. The totality of Miles' contacts warrant the exercise of general personal jurisdiction, and in so holding, the Eighth Circuit was not inconsistent with the authority referenced above.

Nor is the Eighth Circuit's decision inconsistent with the precedent of this Court. Little improvement could be made on how the Eighth Circuit succinctly characterized the facts and law in this case:

> In any case, we could not conclude that Miles is unconstitutionally burdened by having to

defend this suit in South Dakota. Even without the appointment of the process agent, Miles should have foreseen similar suits in South Dakota at the time Sondergard consumed Alka-Seltzer Plus. Miles admits that it distributed Alka-Seltzer Plus for sale throughout South Dakota at the time Sondergard took it. Its sales in South Dakota are "not simply an isolated occurrence, but arise [] from the efforts . . . to serve, directly or indirectly, the market for its product in [South Dakota]." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Thus, Miles had purposely availed itself of the benefits and privileges of South Dakota's laws and economy. *See, e.g., Hanson v. Denckla*, 355 U.S. 220, 253-54 (1957). Its own activities created a connection with South Dakota through which it could reasonably foresee being haled into court in South Dakota. *See, e.g., World-Wide Volkswagen*, 444 U.S. at 296. Had Sondergard consumed the Alka-Seltzer Plus in South Dakota, there would be no question about the constitutionality of South Dakota's personal jurisdiction.

Thus, Miles is left to argue that they could not foresee being sued in South Dakota on this particular cause of action. This argument rings hollow, however, when one realizes that Miles does not engage in face-to-face transactions with the buyers of its products, and does not attempt to structure its sales of Alka-Seltzer Plus with regard to whether or not it might be sued in South Dakota. Instead, it sells Alka-Seltzer in every state. Because Miles does not limit who may buy its product or where they may buy it, we cannot conclude that Miles is unconstitutionally burdened by having to defend this suit

> in South Dakota simply because the plaintiff did not consume its product there. We believe that South Dakota's exercise of personal jurisdiction over Miles would not violate "traditional notions of fair play and substantial justice." *See, e.g., International Shoe v. Washington,* 326 U.S. 310, 318 (1945).

Sondergard v. Miles, Inc., 985 F.2d at 1397.

CONCLUSION

In summary, the questions presented by Miles in the instant case do not warrant review by this Court. Contrary to Miles' claim, the Eighth Circuit Court of Appeal's decision is analytically consistent with other relevant federal authority addressing the issue of express and implied consent to jurisdiction. Notwithstanding the existence of express consent, Miles' contacts with the State of South Dakota warrant the exercise of general *in personam* jurisdiction.

In any event, the facts in this case do not present the kind of pure "express consent" issue Miles claims it does. It is submitted that if this court wishes to review the exercise of express consent to jurisdiction, the instant

case, given Miles' obvious and substantial direct contacts with the forum, does not provide the appropriate vehicle for such consideration.

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No. 92-1817

In The

Supreme Court of the United States

October Term, 1992

MILES INC.,

Petitioner,

v.

DONALD BRUCE SONDERGARD,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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I. RESPONDENT HAS NOT RECONCILED THE EIGHTH CIRCUIT'S OPINION BELOW WITH THE DECISIONS OF OTHER CIRCUITS AND THIS COURT WITH RESPECT TO WHETHER A CORPORATION'S APPOINTMENT OF A REGISTERED AGENT CONSTITUTES A WAIVER OF THE RIGHT TO BE SUED ONLY IN JURISDICTIONS WHERE IT HAS HAD MINIMUM CONTACTS.

A. There Is A Conflict Among The Lower Courts.

In its Petition For Certiorari, Miles Inc. ("Miles") showed that the Eighth Circuit's decision below is directly in conflict with the decisions of the Fifth, First and Fourth Circuits in *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 182 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1047 (1993); *Sandstrom v. Chemlawn Corp.*, 904 F.2d 83, 89 (1st Cir. 1990); and *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745 (4th Cir.), *cert. denied*, 404 U.S. 948 (1971). In those cases, and in several district court decisions, the courts held that the appointment of a registered agent was not sufficient to establish jurisdiction under the Due Process Clause. Respondent Sondergard attempts to distinguish these cases, but to no avail.

Sondergard first argues that none of these cases "specifically address the issue of express consent" (Brief In Opposition at 6), then he concedes that *Siemer* did address the consent issue (*Id.*). Indeed, *Siemer* held that the appointment of a registered agent does *not* constitute a consent to jurisdiction or a waiver of constitutional rights. 966 F.2d at 183. Sondergard next attempts to distinguish *Siemer* on the basis that Donald Sondergard was a resident of the forum state at the time the suit was filed

(having moved there after the cause of action arose elsewhere). However, the plaintiff's domicile is completely irrelevant to a "consent" or "waiver" analysis.[1] Finally, Sondergard tries to distinguish this case from *Siemer* on the ground that "Miles did and continues to do substantial business in the state." (Brief In Opposition at 7.) However, this is an unwarranted assertion based on no evidence in the record. There is certainly no evidence that Miles' activity was more substantial than the forum state activities of the *Siemer* defendant, Learjet, which sold over one percent of its products in the forum state,[2] had a subsidiary in the forum state, advertised in the forum state and mailed information to prospective customers in the forum state. 966 F.2d at 181. The record here only shows that Miles products appeared on store shelves in

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[1] Even under a "minimum contacts" analysis, which Sondergard is trying to avoid here, the plaintiff's domicile is irrelevant unless there is some relationship between the plaintiff and defendant and the plaintiff's residence is the focus of the defendant's activities out of which the suit arises. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984). *See Rush v. Savchuk*, 444 U.S. 320, 327 (1980) (no jurisdiction though plaintiff moved to forum state after cause of action arose; due process focuses on "the relationship among the *defendant*, the forum, and the litigation" (emphasis added)). Here, it is undisputed that the cause of action did *not* arise from Miles' South Dakota activities, and Miles had no relationship with Sondergard that would point to the existence of any other contacts between Miles and South Dakota. Sondergard's residence is not relevant to the minimum contacts analysis, and is certainly not determinative as suggested by Sondergard.

[2] There is no corresponding evidence as to what percentage of Miles' sales are to residents of South Dakota, which contains 0.28% of the nation's population. World Almanac at 385, 642 (1993).

the forum state. The same was true in *Siemer*. *Siemer* is constitutionally indistinguishable from the present case.

Sondergard's attempt to distinguish *Ratliff* and *Sandstrom* is equally unavailing. He argues that those cases were decided under the principal of "implied consent" (which Sondergard equates with "minimum contacts") instead of the principal of "express consent" (which he equates with waiver),[3] under which he contends the present case was decided. (Brief In Opposition at 4, 7.) In other words, although the facts of *Ratliff* and *Sandstrom* are the same as those of the present case (registered agent in forum, cause of action arising outside forum), and the *holdings* are in conflict (exercise of jurisdiction held unconstitutional in those cases, constitutional by Eighth Circuit below), Sondergard is apparently arguing that the *rationale* of each case is different. Sondergard's assertion is both inaccurate and irrelevant.

Contrary to Sondergard's assertion, the courts in *Sandstrom* and *Ratliff* did not ignore the express consent theory. They rejected it. The district court in *Sandstrom* determined that there was no "consensual submission" to

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[3] Waiver of constitutional rights is a question to be decided under federal law. *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 630 (1988); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). Waiver is a voluntary, knowing, intelligently-made relinquishment of a known right with full knowledge of the consequences. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). There is a strong presumption against waiver of constitutional rights, including due process rights. *Johnson v. U.S. Dep't of Agriculture*, 734 F.2d 774, 784 (11th Cir. 1984); *Monsanto Co. v. Ruckelshaus*, 753 F.2d 649 (8th Cir. 1985).

jurisdiction connected with the appointment of a registered agent, and the First Circuit found this analysis "convincing[]." 904 F.2d at 89 n. 6. In *Ratliff*, the Fourth Circuit did not use the term "express consent," but implicitly rejected that type of standard. The court applied *International Shoe* in rejecting all talismanic or "mechanical" tests for jurisdiction, including "presence" and "mere compliance with procedural requirements of notice." 444 F.2d at 746-47. "Express consent" – or whatever term is used to describe the analysis that deems the appointment of a registered agent to be sufficient without further inquiry – is a mechanical test of the type rejected by *Ratliff* on the strength of *International Shoe*.

Even if the lower courts have employed different rationales in reaching their different conclusions, that is a reason for *granting* certiorari rather than denying it in the present case. Circuit splits are *often*, if not usually, caused by courts applying different standards to identical facts in order to achieve different results. The question here is the constitutional significance of the appointment of a registered agent. The lower courts have reached conflicting results. Should this Court allow the lower courts to apply differing standards to the question of whether fundamental constitutional rights have been waived? Should the Court allow the lower courts to reach different results on identical facts where important constitutional rights are concerned? Should the lower courts decide for themselves whether to ignore or to apply *International Shoe*? The answer to these questions is clearly "no." Resolving these types of conflicts and establishing uniform standards to be applied by the lower courts are among the primary purposes of certiorari jurisdiction. *Braxton v.*

United States, ___ U.S. ___, 111 S.Ct. 1854, 1857 (1991); Supreme Court Rule 10.1(a).

Finally, even if *Ratliff* and *Sandstrom* are somehow ineligible for circuit split consideration because they allegedly did not address "express consent," that still leaves *Siemer* in the fray. Sondergard admits that *Siemer* did address express consent. *Siemer* is indistinguishable factually and its holding is irreconcilable with the Eighth Circuit's. Regardless of how the Court views Sondergard's attempted distinction between express and implied consent, there remains a circuit split to be resolved by the Court.

B. The Eighth Circuit's Decision Conflicts With Decisions Of This Court.

Sondergard argues that the Eighth Circuit's decision was consistent with Supreme Court precedent. He cites mostly pre-*International Shoe* decisions, which Miles has already discussed. *See* Petition For Certiorari at 12-13. And he conspicuously avoids discussing *Shaffer v. Heitner*, 433 U.S. 186 (1977), the most significant post-*International Shoe* case in this context. *See* Petition For Certiorari at 13. However, Sondergard also cites *dicta* from two post-*International Shoe* cases that must be analyzed.

Sondergard selects a sentence from *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 444 (1952), suggesting that service of process on a registered agent would be sufficient to confer jurisdiction. The immediately following sentence, not quoted by Sondergard, states: "This has been squarely held to be so in a proceeding in personam against such a corporation, *at least in relation to a cause of*

action arising out of the corporation's activities within the state of the forum." 342 U.S. at 444-45 (emphasis added). The Court in *Perkins* did not purport to address the question raised here: is the appointment of a registered agent alone sufficient in a case that arose in another state? If it had, it surely would have applied *International Shoe*, which it followed in other respects, rather than adopting the mechanical "consent" test employed by the Eighth Circuit. Indeed, the Court in *Perkins* went on to state:

> The corporate activities of a foreign corporation which, under state statute, make it necessary for it to secure a license and to designate a statutory agent upon whom process may be served provide *a helpful but not a conclusive test.*

342 U.S. at 445 (emphasis added).

Sondergard also cites *dicta* from *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988). However, that case involved a statute of limitations question under the Commerce Clause. It also involved a cause of action that arose in the forum state, unlike the present case. The Court did not decide the issues presented here, and did not discuss either "express consent" or the applicability of *International Shoe*.

II. RESPONDENT HAS NOT RECONCILED THE EIGHTH CIRCUIT'S ALTERNATIVE RULING WITH THE DECISIONS OF OTHER CIRCUITS.

Sondergard attempts to reconcile the Eighth Circuit's alternative ruling – that even in the absence of a registered agent, the appearance of Miles' product on store shelves in South Dakota is by itself sufficient to support

jurisdiction – with the decisions of other circuits. However, his argument is based on mischaracterizations of the record.

First, Sondergard flatly states that he did not waive an evidentiary hearing. (Brief In Opposition at 2, n.1.) This is simply untrue, as set forth in the transcript of proceedings reprinted in Appendix B of the Petition For Certiorari at A23. Sondergard did file a motion for reconsideration in an attempt to "un-waive" his right to an evidentiary hearing after he had lost in the district court, but that court did not allow him a second bite of the apple. *See* Appendix C to the Petition For Certiorari at A39.

Second, Sondergard argues that the forum state activities of the defendants in *Ratliff* and *Siemer* were "minimal compared to Miles' presence and sales in South Dakota." (Brief In Opposition at 13.) The record belies this statement. There is no quantification of Miles' activities whatsoever in this record. There is no evidence of any activity of Miles at all in South Dakota, other than that someone sells its products there. *Ratliff* and *Siemer,* and the host of other cases cited in the Petition For Certiorari, stand for the proposition that sales alone, or even combined with other factors that have not been established here, are insufficient to support general jurisdiction.

Third, Sondergard attempts to distinguish *Glater v. Eli Lilly & Co.*, 744 F.2d 213 (1st Cir. 1984), on the ground that "neither the sales representatives nor Eli Lilly directly sold products in the forum state." (Brief In Opposition at 14.) Sondergard implies that Miles *did* sell its products directly to customers in South Dakota. Again,

this implication is unwarranted. Sondergard presented no evidence as to *how* Miles' products reached consumers in South Dakota. There is no evidence of any direct sales by Miles in South Dakota, and thus no basis for distinguishing *Glater.*

Finally, Sondergard attempts to distinguish *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987), in which $250,000,000 of sales of the defendant's products in the forum state of worth were insufficient to support general jurisdiction. Sondergard points out that in *Bearry,* sales by Beech were negotiated and executed outside the forum state, even though the ultimate purchasers lived and used the products in the forum state. (Brief In Opposition at 15.) As far as the record shows, the same may well be true here. There is no evidence to the contrary.

Sondergard does not attempt to support the argument that the Eighth Circuit's alternative holding is consistent with decisions of this Court. He merely quotes the Eighth Circuit's opinion at length. Because Miles has already discussed the conflict between that opinion and the decisions of this Court, no further discussion is necessary.

CONCLUSION

For all of these reasons, the petition for certiorari should be granted.

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